DOCKET

No. 08-1225
Vide 08-1119
Title: United States, Petitioner
v.
Milavetz, Gallop & Milavetz, P.A., et al.
Docketed: April 3, 2009
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (07-2405)
Decision Date: September 4, 2008
Rehearing Denied: December 5, 2008
Questions Presented

Date	Proceedings and Orders
Feb 19 2009	Application (08A725) to extend the time to file a petition for a writ of certiorari from March 5, 2009 to April 6, 2009, submitted to Justice Alito.
Feb 20 2009	Application (08A725) granted by Justice Alito extending the time to file until April 6, 2009.
Apr 3 2009	Petition for a writ of certiorari filed. (Response due May 4, 2009)
May 4 2009	Brief of respondents Milavetz, Gallop & Milavetz, P.A., Robert J. Milavetz, and Barbara Nilva Nevin in opposition filed.
May 19 2009	DISTRIBUTED for Conference of June 4, 2009.
May 19 2009	Reply of petitioner United States filed. (Distributed).
Jun 8 2009	Petition GRANTED The petition for a writ of certiorari in No. 08-1119 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jul 2 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 25, 2009.
Jul 2 2009	The time within which to file respondent's brief on the merits is extended to and including October 21, 2009.
Jul 2 2009	Joint motion to amend the briefing schedule and expand the word limits filed. VIDED.
Jul 27 2009	Motion of the parties to amend the briefing schedule and expand the word limits GRANTED. Petitioners in No. 08-1119 will file an opening brief, not to exceed 20,000 words, on or before August 25, 2009. Petitioner in No. 08-1225 will file a response brief, not to exceed 20,000 words, on or before October 21, 2009. Petitioner in No. 08-1119 will file a reply brief, not to exceed 10,000 words, on or before November 20, 2009.
Aug 24 2009	Joint appendix filed (statement of costs received). VIDED.
Aug 25 2009	Brief of Milavetz, Gallop & Milavetz, P.A., et al. filed. VIDED.
Aug 27 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioners. VIDED.
Aug 28 2009	Brief amici curiae of National Association of Consumer Bankruptcy Attorneys, et al. filed. VIDED.
Sep 28 2009	SET FOR ARGUMENT ON Tuesday, December 1, 2009.
Sep 29 2009	CIRCULATED.
Oct 21 2009	Brief of petitioners United States filed. VIDED. (Distributed)
Oct 28 2009	Brief amici curiae of Public Good, et al. filed. VIDED. (Distributed)
Nov 20 2009	Reply of Milavetz, Gallop & Milavetz, P.A., et al. filed. VIDED. (Distributed)

Dec 1 2009 Argued. For petitioners in No. 08-1119 and respondents in No. 08-1225: G. Eric Brunstad, Jr., Hartford, Conn. For respondents in No. 08-1119 and petitioner in No. 08-1225: William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The questions presented are as follows:

1. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.

2. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents, who were appellees in the court of appeals, are Milavetz, Gallop & Milavetz, P.A.; Robert J. Milavetz; Barbara N. Nevin; Ronald Richardson (captioned as John Doe); and Lynette Richardson (captioned as Mary Doe). The district court denied the Doe respondents leave to proceed pseudonymously.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 541 F.3d 785. The opinion of the district court denying the government's motion to dismiss (App., *infra*, 29a-44a) is reported at 355 B.R. 758.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 5, 2008 (App., *infra*, 47a). On February 20, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

April 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 48a-53a.

STATEMENT

This case involves a facial First Amendment challenge to 11 U.S.C. 526(a)(4), a provision of the Bankruptcy Code that regulates paid bankruptcy advice. Congress has established certain minimum standards of professional conduct for bankruptcy attorneys, bankruptcy petition preparers, and other "debt relief agencies" that charge consumer debtors for bankruptcy assistance. Section 526(a)(4) provides, *inter alia*, that debt relief agencies may not advise clients to incur additional debt "in contemplation of" filing a bankruptcy petition. The district court declared Section 526(a)(4) facially invalid under the First Amendment. A divided panel of the court of appeals affirmed. Shortly thereafter, the Fifth Circuit upheld Section 526(a)(4) against a substantially similar challenge and endorsed the reasoning of the dissenting opinion in this case. *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743 (2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009).

1. Congress enacted Section 526(a)(4) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring per-

sonal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*House Report*). Described by the House Report as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," *id.* at 3, the BAPCPA both modified the substantive standards for bankruptcy relief and adopted new measures intended to curb a variety of abusive practices that Congress concluded had come to pervade the bankruptcy system.

After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions and, in some circumstances, jeopardized debtors' ability to obtain a discharge of their debts. For example, Congress heard evidence that a civil enforcement initiative undertaken by the United States Trustee Program had "consistently identified * * * misconduct by attorneys and other professionals" as among the sources of abuse in the bankruptcy system. *House Report* 5 (citation omitted). Congress responded by "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The BAPCPA added or strengthened several regulations on bankruptcy professionals' conduct. Those regulations are intended to protect the clients and prospective clients of bankruptcy professionals, the creditors of clients who do enter bankruptcy, and the bankruptcy system. The regulations require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system.

See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D). Many of the regulations apply equally to bankruptcy attorneys, to bankruptcy petition preparers who are not attorneys, and to all other professionals who provide bankruptcy assistance to consumer debtors for a fee; those professionals are collectively termed "debt relief agenc[ies]." 11 U.S.C. 101(12A).[1]

Section 526 sets out four basic rules of professional conduct for debt relief agencies. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising an assisted person to make statements that are untrue or misleading in seeking bankruptcy relief. Section 526(a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the benefits and risks attendant to filing for bankruptcy. And Section 526(a)(4), the provision held unconstitutional below, states:

> A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

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[1] The term "bankruptcy assistance" is defined to include providing an "assisted person" with advice, counsel (including "legal representation"), or document preparation or filing assistance "with respect to a case or proceeding under" the Bankruptcy Code. 11 U.S.C. 101(4A). An "assisted person" is "any person whose debts consist primarily of consumer debts" and whose nonexempt property is worth less than a specified, inflation-adjusted amount, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

The principal remedy for violations of Section 526 is a civil action by the debtor to recover the debtor's "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). The statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). The bankruptcy court may also impose an injunction or an "appropriate civil monetary penalty" for intentional or recurring violations, either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Respondents are a law firm, two of the firm's attorneys, and two prospective clients. App., *infra*, 1a-2a.[2] They filed this action against the United States, seeking a declaratory judgment that the attorney respondents are not obligated to comply with several of the BAPCPA's provisions regulating debt relief agencies' professional conduct, including the advice limitation in Section 526(a)(4). Respondents contended that licensed attorneys are not "debt relief agencies" within the meaning of the statute even if they provide bankruptcy-related advice to debtors. They also claimed that, to the extent the statute encompasses licensed attorneys, Section 526(a)(4) and other provisions of the BAPCPA violate the First Amendment. *Id.* at 2a.

The district court denied the government's motion to dismiss, App., *infra*, 29a-44a, and then granted summary judgment for respondents, *id.* at 45a. The court held that Section 526(a)(4) and the other challenged provisions violate the First Amendment. *Id.* at 33a-41a.

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[2] The district court denied the prospective clients leave to proceed pseudonymously, App., *infra*, 31a-33a, and they disclosed their identities in an amended complaint, see 05-CV-2626 Docket entry No. 34, at 3 (D. Minn. Dec. 15, 2006).

The court further held that attorneys do not fall within the statutory definition of "debt relief agency." *Id.* at 41a-43a.

3. The government appealed, contending in relevant part that attorneys unambiguously fall within the definition of "debt relief agency" and that the district court's constitutional holding was premised on a misreading of Section 526(a)(4). Gov't C.A. Br. 18-41, 49-54. The government explained that the phrase "in contemplation of" bankruptcy is a term of art with a specialized meaning. Based on that established understanding, the government argued, Section 526(a)(4) should be construed to forbid only advice that a client take on new debt on the eve of bankruptcy with the intent of abusing the bankruptcy system. The government further contended that, to the extent the term "in contemplation of" is ambiguous, the doctrine of constitutional avoidance supports the government's narrow reading of the term, which avoids the overbreadth that the district court perceived.

4. The court of appeals affirmed in part and reversed in part. The court unanimously agreed that attorneys may fall within the definition of "debt relief agency," but held by a divided vote that Section 526(a)(4) violates the First Amendment. App., *infra*, 1a-28a.[3]

a. The court of appeals rejected the government's proposed narrowing construction of Section 526(a)(4). App., *infra*, 12a. The court concluded that, under the only permissible interpretation of the statute's "plain language," Section 526(a)(4) prohibits debt relief agencies from advising consumer clients "to incur *any* additional debt when the assisted person is contemplating

[3] The court unanimously rejected respondents' challenges to certain disclosure requirements imposed by 11 U.S.C. 528. App., *infra*, 15a-21a.

bankruptcy," *ibid.*, and that "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws," *id.* at 13a.

Based on that broad construction, the court of appeals held that Section 526(a)(4) is unconstitutionally overbroad.[4] App., *infra*, 12a-14a. The court explained that advice to take on new debt just before bankruptcy will sometimes be legitimate. As examples, the court observed that "it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments," or to purchase a car to ensure "dependable transportation * * * to and from work." *Id.* at 13a-14a. And the court stated that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. The court concluded that the First Amendment precludes regulation of such legitimate advice, and it noted its agreement with three district courts that had reached the same conclusion. See *id.* at 13a & n.8 (citing, *inter alia*, *Hersh* v. *United States*, 347 B.R. 19, 25 (N.D. Tex. 2006)).

The court of appeals did not identify the precise constitutional standard under which respondents' challenge should be evaluated. Respondents had argued that

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[4] The court of appeals did not limit its holding to the plaintiffs before it, but stated more generally that the statute was "unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies." App., *infra*, 12a; see *id.* at 10a n.7, 15a, 21a; see also *id.* at 23a n.13 (Colloton, J., concurring in part and dissenting in part). Nothing in the court of appeals' statutory and First Amendment analysis, moreover, suggests that the court would reach a different conclusion regarding the statute's application to non-attorney professionals who provide bankruptcy advice.

strict scrutiny should apply, while the government had contended that Section 526(a)(4) is a reasonable regulation of attorneys' professional conduct that is to be reviewed more deferentially under the standard announced in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). The court acknowledged that the government had a "legitimate interest" in prohibiting advice that would assist debtors in abusing the bankruptcy system by accumulating more debt in contemplation of bankruptcy. App., *infra*, 12a. But the court held that, on its reading of Section 526(a)(4), the statute was insufficiently connected to that legitimate interest and therefore was unconstitutional under either strict scrutiny or the *Gentile* standard. *Id.* at 12a-13a.

b. Judge Colloton dissented in relevant part. He explained that, in his view, "[t]he text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction," under which "the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system." App., *infra*, 25a. He would have held that the statute, so construed, is constitutional. See *id.* at 22a, 25a, 28a.

First, Judge Colloton observed that the phrase "in contemplation of bankruptcy" is a term of art that "has been construed * * * to mean actions taken with the intent to abuse the protections of the bankruptcy system." App., *infra*, 25a; see *id.* at 25a-26a (collecting authorities). Second, Judge Colloton pointed out that the remedies for a violation of Section 526(a)(4) "emphasize actual damages," and he reasoned that a debtor who follows his attorney's bankruptcy advice is unlikely to be harmed as a result unless he is induced to file "an abusive bankruptcy petition, where the debtor may suffer

damages if the petition is dismissed as abusive." *Id.* at 27a (citing 11 U.S.C. 707(b)(1)). Third, Judge Colloton pointed to legislative history that showed Congress's desire to address "abusive" practices by bankruptcy professionals and by debtors who "knowingly load up" on debt before filing for bankruptcy. *Id.* at 27a-28a (quoting *House Report* 5, 15). The dissent concluded: "Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that [respondents] say[] is absurd, that the [government] says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." *Id.* at 28a.

5. The court of appeals denied rehearing en banc by a vote of 6-5. See App., *infra*, 47a.

6. Thirteen days later, the Fifth Circuit upheld Section 526(a)(4) against a substantially similar First Amendment challenge, reversing one of the district court opinions on which the court of appeals in this case relied. *Hersh*, 553 F.3d at 752-764; see App., *infra*, 13a n.8. The court endorsed the reasoning and the authorities in Judge Colloton's dissenting opinion. See 553 F.3d at 750 n.6, 759 n.17.

7. Respondents have filed their own petition for a writ of certiorari, which seeks review of the court of appeals' holding that attorneys may be "debt relief agencies" for purposes of Section 526, as well as its holding (see note 3, *supra*) that Section 528's disclosure requirements are valid. See Pet. at ii, *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, No. 08-1119 (filed Mar. 5, 2009). The government will address that petition in a separate response.

REASONS FOR GRANTING THE PETITION

A divided panel of the court of appeals has invalidated an Act of Congress, even though the statute can constitutionally be applied to a significant range of conduct. The court failed to give due regard to a narrowing construction that eliminates the perceived constitutional difficulty, and its ruling squarely conflicts with a Fifth Circuit decision that adopted the constitutionally unproblematic construction that the court rejected in this case. The Eighth Circuit's decision also threatens to undermine the important reforms that Congress crafted, after years of study, to reduce the abuse of the bankruptcy system, including abuse encouraged by lawyers. This Court's review is warranted to prevent those harms, to resolve the circuit conflict, and to effectuate Congress's efforts to craft a federal remedy for the provision of abusive bankruptcy advice.

I. THE CIRCUITS ARE IN CONFLICT OVER THE CONSTITUTIONALITY OF AN ACT OF CONGRESS

The court of appeals' decision in this case squarely conflicts with the Fifth Circuit's resolution of the same statutory and constitutional issues as are presented here. As the Fifth Circuit has recognized, Section 526(a)(4) imposes a modest requirement to refrain from urging a debtor to accumulate eve-of-filing debt that would abuse the bankruptcy system. The court of appeals here imposed its own, much more expansive construction and then struck down the statute, so interpreted, as overbroad. As a result, attorneys in the Eighth Circuit who qualify as "debt relief agencies" are free to urge even the most abusive practices without being subject to the federal sanctions and client-protection measures set out in Section 526(a)(4) and (c).

A. In *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009), a bankruptcy attorney challenged Section 526(a)(4) on grounds substantially similar to those respondents raised here. Hersh contended that Section 526(a)(4) unambiguously prohibits attorneys from advising clients who are considering bankruptcy to incur *any* additional debt, and that Section 526(a)(4) so construed is unconstitutionally overbroad. *Id.* at 747 & n.3, 754, 762. A unanimous Fifth Circuit panel rejected both of these arguments. *Id.* at 752-764. The Fifth Circuit acknowledged the court of appeals' contrary holding in this case but stated that it "agree[d] with Judge Colloton's dissenting opinion." *Id.* at 750 n.6.[5]

1. The Fifth Circuit in *Hersh* agreed with the government that Section 526(a)(4) can be construed in a way that focuses directly on Congress's acknowledged purpose in enacting it: preventing attorneys from encouraging their clients to "load up" on debt to abuse the bankruptcy system. 553 F.3d at 758-761. The court noted that the term "in contemplation of bankruptcy" is often used as a term of art that connotes an intent to abuse the bankruptcy system. *Id.* at 758 (citing *Black's Law Dictionary* 336 (8th ed. 2004) (*Black's Law Dictionary*)). Indeed, a few years before Congress enacted the BAPCPA, the Fifth Circuit itself had described the abusive practice of "incurring card debt in contemplation of bankruptcy" with the term "loading up." *Id.* at

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[5] Like the respondents in this case, Hersh also argued that attorneys cannot be "debt relief agencies" subject to the restrictions imposed by Section 526(a)(4). See 553 F.3d at 751-752. The Fifth Circuit rejected that argument, *id.* at 752, as the court of appeals unanimously did here, see App., *infra*, 3a-10a.

758-759 (quoting *AT&T Universal Card Servs.* v. *Mercer (In re Mercer)*, 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc)). The Fifth Circuit in *Hersh* noted that Judge Colloton had adopted the same reasoning in this case, and it cited Judge Colloton's dissenting opinion for additional supporting sources. *Id.* at 759 & n.17.

The court in *Hersh* also explained that the structure of Section 526 supported the specialized interpretation described above. See 553 F.3d at 759-760, 761. Like Judge Colloton, see App., *infra*, 26a-27a, the Fifth Circuit pointed out that violations of Section 526 may be remedied by awarding the debtor actual damages, which strongly suggests that the practices banned are practices that would actually harm the debtor. See 553 F.3d at 760. And the court noted that Section 526(a)(4) was enacted alongside, and placed together with, "three other rules of professional conduct designed to protect debtors." *Id.* at 761 (citing 11 U.S.C. 526(a)(1)-(3)).

The court in *Hersh* agreed with Judge Colloton that the legislative history and purpose of the BAPCPA supported its construction of Section 526(a)(4). It explained that numerous elements of the BAPCPA were demonstrably "intended to curb abuse," which the court took as further evidence that "as part of this plan, section 526(a)(4) is only meant to curb abusive practices." 553 F.3d at 761; accord App., *infra*, 26a-27a (Colloton, J., concurring in part and dissenting in part).

2. The Fifth Circuit further explained that, even if its reading of Section 526(a)(4) were not the most natural interpretation of the statute, that reading would be compelled by the doctrine of constitutional avoidance. The court identified numerous cases in which this Court had adopted an arguably countertextual construction in the interest of constitutional avoidance, including *Boos*

v. *Barry*, 485 U.S. 312 (1988), on which Judge Colloton had relied significantly, see App., *infra*, 23a-24a. See 553 F.3d at 756-758. As the Fifth Circuit noted, the avoidance doctrine may even require giving "[a] restrictive meaning [to] what appear to be plain words." *Id.* at 757 (quoting *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957)) (first brackets in original).

The Fifth Circuit acknowledged Hersh's argument, identical to that advanced by respondents and endorsed by the court below, that the text of Section 526(a)(4) is so unambiguous that no narrowing construction is possible. See 553 F.3d at 754. The court concluded, however, that "the language of [the statute] can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system." *Id.* at 761; see *id.* at 756. The court explained that, on that reading, "[S]ection 526(a)(4) has no application to good faith advice to engage in conduct that is consistent with a debtor's interest and does not abuse or improperly manipulate the bankruptcy system." *Id.* at 761.

3. The Fifth Circuit concluded that, if Section 526(a)(4) is construed in this manner, it is not facially unconstitutional. The court explained that a statute is not unconstitutionally overbroad unless the "overbreadth is substantial in relation to the statute's legitimate reach." 553 F.3d at 762 (citing *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008)). Hersh did not dispute that Congress could validly regulate the sort of advice to engage in abusive conduct that all parties agreed was covered by Section 526(a)(4). See *id.* at 754-

756.[6] And under the court's narrowing construction, Section 526(a)(4) did not apply to *any* of Hersh's examples of speech that could not constitutionally be prohibited. *Id.* at 763. Accordingly, the Fifth Circuit found it "clear that the potential for the statute to prohibit protected speech is not by any means *substantial* in relation to the statute's legitimate reach." *Id.* at 764.

B. The Fifth Circuit's decision cannot be reconciled with the decision below. The Fifth Circuit adopted the government's proposed construction of Section 526(a)(4), whereas the court below found that construction to be foreclosed by the statutory text. As a result of those divergent statutory interpretations, the Fifth Circuit upheld the statute against a First Amendment challenge, while the court below invalidated Section 526(a)(4) as an unconstitutional infringement on the right of attorneys to provide non-abusive bankruptcy-related advice. And the Eighth Circuit, by a closely divided vote, has declined to reconsider its position en banc. App., *infra*, 47a.

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[6] The Fifth Circuit in *Hersh* noted various contexts in which the First Amendment permits Congress and the States to regulate that sort of unethical attorney advice. For instance, the First Amendment does not protect speech proposing an illegal transaction, and abusive accumulation of debt may amount to fraud or theft. See 553 F.3d at 755 (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982)). Further, the government has a sufficiently important interest in the judicial process, including the bankruptcy system, to justify regulation of attorneys' unethical conduct affecting that process. See *id.* at 755-756 (citing *Gentile* v. *State Bar*, 501 U.S. 1030 (1991), and Model Rules of Professional Conduct Rule 1.2(d)). The court in *Hersh* explained that the abusive accumulation of debt in contemplation of bankruptcy "is akin to committing a fraudulent act," and therefore "Congress can constitutionally prevent attorneys or other debt relief agencies from advising their clients to [commit such an act]." *Id.* at 756.

The question presented here is a recurring one, as substantially similar challenges to Section 526(a)(4) are also pending in the Second and Ninth Circuits.[7] Review by this Court is warranted to resolve the division in the courts of appeals over the constitutionality of this important federal statute.

II. THE COURT OF APPEALS ERRED IN HOLDING SECTION 526(a)(4) UNCONSTITUTIONALLY OVERBROAD

The court of appeals' decision in this case is erroneous. The court below acknowledged that Congress had a "legitimate interest" in restricting bankruptcy professionals from peddling abusive strategies to individuals who are facing bankruptcy. App., *infra*, 12a. The government construes the statute to further that interest directly, by prohibiting only advice that would lead to intentional abuse of the bankruptcy system.

The court of appeals did not dispute that Congress could enact such a prohibition without violating the First Amendment. Rather, the court held that Section 526(a)(4) *unambiguously* sweeps in other attorney advice, unrelated to abuse of the bankruptcy system, and that the statute is therefore fatally overbroad. Both the statutory premise and the constitutional conclusion are flawed. As the text, structure, and purposes of Section 526(a)(4) make clear, Congress forbade only advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors. That prohibition is consistent with the First Amendment.

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[7] See *Zelotes* v. *Adams*, No. 07-1853 (2d Cir. argued Oct. 10, 2008); *Connecticut Bar Ass'n* v. *United States*, No. 08-5901 (2d Cir.) (argument not yet scheduled); *Olsen* v. *Holder*, No. 07-35616 (9th Cir.) (argument not yet scheduled).

A. The court of appeals rejected the government's interpretation of Section 526(a)(4) in a single sentence, asserting that the statute's "plain language" precludes any construction other than the unconstitutionally overbroad one. App., *infra*, 12a. The court did not identify any statutory term that unambiguously compelled such a reading. Rather, without quoting the statutory text, the court stated that "[Section] 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Ibid.* But the statute does not use the temporal phrase "*when* the assisted person is contemplating bankruptcy." Rather, the statute forbids advising the client "to incur more debt *in contemplation of* [bankruptcy]." 11 U.S.C. 526(a)(4) (emphasis added). The difference is significant, as Judge Colloton explained.

The statute's reference to debt incurred "in contemplation of [bankruptcy]" is reasonably read to mean debt incurred with the expectation of using the bankruptcy discharge to avoid full repayment. As Judge Colloton observed, "the phrase 'in contemplation of' has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system." App., *infra*, 25a; see, *e.g.*, *Black's Law Dictionary* 336 (defining "contemplation of bankruptcy" as "[t]he thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*") (emphasis added). Indeed, more than a century of "American and English authorities construing the bankruptcy laws also support the proposition that the words 'in con-

templation of" may be understood to require an intent to abuse the bankruptcy laws." App., *infra*, 25a (Colloton, J., concurring in part and dissenting in part); see *id.* at 25a-26a (citing cases); accord *Hersh*, 553 F.3d at 758-760. Congress's use of an established term of art may reasonably be understood to incorporate the same meaning that those authorities have given it. See, *e.g.*, *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2605 (2007).

The Eighth Circuit did not rebut the dissent's understanding of prior judicial decisions construing the phrase "in contemplation of" in the bankruptcy context. Nor did the court identify any reason to believe that Congress, in enacting Section 526(a)(4), intended to depart from that prior understanding. Indeed, the court did not respond to the dissent's analysis at all; it simply asserted without explanation that "the plain language of the statute does not permit this narrow interpretation." App., *infra*, 12a.

The statutory context and structure support the reading of the term "in contemplation of" that was endorsed by the dissent below and adopted by the Fifth Circuit in *Hersh*. See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). The other three subdivisions of Section 526(a) unambiguously establish rules of professional conduct designed to protect debtors from abusive practices by the attorneys and other debt relief agencies who advise them. See 11 U.S.C. 526(a)(1) (prohibiting debt relief agencies from failing to perform promised services); 11 U.S.C. 526(a)(2) (prohibiting debt

relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief); 11 U.S.C. 526(a)(3) (prohibiting debt relief agencies from misrepresenting to debtors the risks or benefits of bankruptcy). Section 526(a)(4)'s placement alongside these other restrictions indicates that it is likewise properly read to target unethical communications by bankruptcy professionals—not, as the court below held, all manner of lawful and ethical attorney advice. See *Hersh*, 553 F.3d at 761.

Furthermore, the principal remedy for violation of each of Section 526's rules of professional conduct is a suit against the attorney (or other debt relief agency) to recover the debtor's "actual damages," as well as restitution of any fees paid by the debtor. 11 U.S.C. 526(c)(2). Congress's emphasis on the debtor's "actual damages" presupposes that the debtor has been injured by the attorney's conduct. As Judge Colloton noted, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." App., *infra*, 27a; accord *Hersh*, 553 F.3d at 759-760.

"In enacting the BAPCPA, Congress was attempting to address common abuses of the bankruptcy system. Congress concluded that there was a pervasive abuse * * * by debtors who incur debt before bankruptcy with the intention of having their debt discharged." *Hersh*, 553 F.3d at 760 (citing *House Report* 15). Construing Section 526(a)(4) in a way that focuses precisely on that goal is perfectly consistent with the statutory text, structure, and purpose.

B. Even if the court of appeals' broad reading of the statute were the most natural one, the court erred in adopting an interpretation that resulted in invalidating

the statute when a plausible alternative reading is constitutionally unproblematic. Particularly in the context of a First Amendment overbreadth challenge, where the plaintiff's demand is to declare a statute invalid even though it may be legitimately applied in some or many circumstances, the federal courts have not only "the power to adopt narrowing constructions," but "the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos*, 485 U.S. at 330-331; see also, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). Indeed, respondents themselves urged the court of appeals to construe another provision, the term "debt relief agency," to avoid the same constitutional overbreadth objection. *E.g.*, Resp. C.A. Br. 17 ("A statute should be interpreted so as to avoid constitutional issues."). The term "debt relief agency," however, has a statutory definition that forecloses respondents' proposed construction. See 11 U.S.C. 101(12A) (defining "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for * * * payment"); App., *infra*, 6a-10a. By contrast, the phrase "in contemplation of [bankruptcy]" is not defined and can reasonably be read to avoid constitutional problems, particularly in light of its status as a term of art in the bankruptcy context.

This Court has repeatedly applied saving constructions to avoid constitutional difficulties, even without the firm grounding in statutory text and context that the Fifth Circuit's reading of Section 526(a)(4) has. For instance, in *Boos*, this Court considered a First Amendment overbreadth challenge to a federal statute that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police." 485

U.S. at 329. The Court acknowledged that "[s]tanding alone, this text is problematic * * * because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330. Nevertheless, in accordance with the "duty to avoid constitutional difficulties" when a narrowing "construction is fairly possible," the Court construed the statute to apply "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'"—a limitation that was unstated in the statute but ensured the validity of the Act. *Id.* at 330-331 (citation omitted). See also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-578 (1988).

Federal courts construe federal statutes to avoid, not invite, constitutional difficulties. *E.g.*, *Boos*, 485 U.S. at 331. The court of appeals disregarded that important principle when it invalidated Section 526(a)(4) without adverting to the doctrine of constitutional avoidance or explaining why its interpretation of the disputed provision was the only plausible reading.

C. Even if the court of appeals' construction were so clearly required by the text of the statute as to overcome the avoidance doctrine, the court's overbreadth analysis would still be deficient. Because "invalidating a law that in some of its applications is perfectly constitutional * * * has obvious harmful effects," this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. The court of appeals failed to adhere to that principle when it struck down Section 526(a)(4) without giving proper weight to the statute's many legitimate applications.

Advice to engage in conduct that amounts to an abuse of the bankruptcy system is plainly subject to congressional regulation. Congress, the state legislatures and state bars, and the federal and state courts routinely require attorneys to abide by professional standards like Section 526(a)(4). Indeed, the conduct that Section 526(a)(4) targets falls squarely within the scope of Rule 1.2(d) of the Model Rules of Professional Conduct, which prohibits attorneys from advising their clients to engage in fraud. See, *e.g.*, *Attorney Grievance Comm'n* v. *Culver*, 849 A.2d 423, 443-444 (Md. 2004) (disciplining an attorney for advising and assisting a client to load up on debt before declaring bankruptcy). Those requirements serve valid and important governmental interests, both in protecting clients from unethical advice and in protecting the judicial process and other litigants from the harm that ensues when clients follow that unethical advice. As the Fifth Circuit noted, the constitutionality of Rule 1.2(d) has never been in doubt. *Hersh*, 553 F.3d at 756. Section 526(a)(4) regulates the very same conduct.

Section 526(a)(4) therefore may validly be applied to a significant category of unethical attorney advice. Against that legitimate sweep, the court below hypothesized two instances of legitimate, ethical advice to accumulate new debt on the eve of bankruptcy: buying a car and refinancing a mortgage.[8] App., *infra*, 13a-14a. The court added that "[f]actual scenarios other than these

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[8] The court assumed that merely refinancing an existing mortgage—that is, exchanging one loan for another with the same principal balance but a different interest rate, repayment period, or other terms—would constitute incurring "more debt" within the meaning of the statute. See App., *infra*, 13a. It is not at all clear that this understanding is correct.

few hypothetical situations no doubt exist." *Id.* at 14a. On that slim and concededly "hypothetical" basis, the majority held the statute unconstitutional as applied to all attorney conduct, including the abusive practices at which Section 526(a)(4) was directly aimed.

As Judge Colloton correctly pointed out, "a facial challenge resting on a 'few hypothetical situations' * * * is unlikely to justify invalidating a statute in *all* of its applications, because 'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" App., *infra*, 24a (quoting *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). The court of appeals here did no more than posit "some impermissible applications" of Section 526(a)(4). *Taxpayers for Vincent*, 466 U.S. at 800. The court did note this Court's admonition that First Amendment challenges of this sort require *substantial* overbreadth compared to the statute's valid coverage. App., *infra*, 15a n.10. But the court merely asserted that "[Section] 526(a)(4) is substantially overbroad," *id.* at 15a, without ever explaining how its "few hypothetical situations" supported that conclusion.

III. THE QUESTION PRESENTED IS IMPORTANT

As this Court has repeatedly observed, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The federal statute at issue here serves an important function in the administration of the Nation's bankruptcy laws, and the circuit conflict over the validity of that statute warrants this Court's review.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama* v. *Citizens Bank*, 549 U.S. 365, 367 (2007) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991)). Section 526(a)(4) is an important part of Congress's effort to preserve that focus on the "honest but unfortunate debtor" by curbing abuse of the bankruptcy system, including abuse that comes at the suggestion of a bankruptcy professional. By invalidating Section 526(a)(4), the court of appeals has frustrated that effort, and the conflict between the decision below and the Fifth Circuit's decision in *Hersh* also undermines Congress's decision "[t]o establish * * * *uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, Cl. 4 (emphasis added); cf., *e.g.*, *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 465-466, 471-472 (1982) (discussing the importance the Framers placed on uniform bankruptcy rules).

A. Congress has long been aware that the relief afforded by the bankruptcy laws creates a perverse incentive for debtors to amass additional debt in contemplation of obtaining a discharge. Congress has recognized that such conduct poses a fundamental threat to the Code's twin goals of affording debtors a fresh start while providing an orderly and equitable system of resolving creditors' claims. For example, when Congress enacted 11 U.S.C. 523(a)(2)(C), which creates a presumption that certain eve-of-bankruptcy debts are not dischargeable, the accompanying Senate Report emphasized that "[e]xcessive debts incurred within a short period prior to the filing of the petition present a special problem: that of 'loading up' in contemplation of bankruptcy." S. Rep. No. 65, 98th Cong., 1st Sess. 9 (1983). The report

explained that "[a] debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property," noting that "[i]n many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent." *Ibid.* As the report concluded, "[n]ot only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation. During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts." *Ibid.* As early as 1973, Congress was informed that "the most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge." *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. I, at 11 (1973).

Congress has accordingly enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections. For instance, it authorized bankruptcy courts to dismiss a petition for "substantial abuse," 11 U.S.C. 707(b) (2000), which could include the debtor's purposeful accumulation of debt in contemplation of bankruptcy. *E.g.*, *Price* v. *United States Tr. (In re Price)*, 353 F.3d 1135, 1139-1140 (9th Cir. 2004). It precluded debtors from obtaining a discharge for debts obtained fraudulently. 11 U.S.C. 523(a)(2)(A). And it provided that certain categories of debts are presumed to be fraudulent and nondischargeable if they are in-

curred on the eve of bankruptcy. 11 U.S.C. 523(a)(2)(C) (2000).

B. When Congress enacted the BAPCPA in 2005, the House Report expressed concern that those earlier measures had not adequately restricted the ability of debtors to "knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." *House Report* 15. Accordingly, Congress strengthened each of the aforementioned protections against bankruptcy abuse. See, *e.g.*, BAPCPA § 310, 119 Stat. 84 (11 U.S.C. 523(a)(2)(C)). Most fundamentally, Congress greatly expanded the bankruptcy courts' authority to dismiss petitions for "abuse" of the bankruptcy system, including in cases in which debtors purposefully incur additional debt in contemplation of filing a petition. See BAPCPA § 102, 119 Stat. 27; *House Report* 48-49. Congress permitted dismissal of a petition based on a less stringent showing of abuse; authorized "any party in interest" to file a motion to dismiss for abuse (except in some cases involving lower-income debtors); repealed the pre-existing presumption in favor of granting the relief sought by the debtor; and specified that bankruptcy courts must consider, in determining whether a petition should be dismissed for abuse when no presumption applies, "whether the debtor filed the petition in bad faith" and whether "the totality of the circumstances * * * of the debtor's financial situation demonstrates abuse." 11 U.S.C. 707(b)(1), (3) and (6); see *House Report* 49.

Congress also made another significant change, which heightened the importance of the professional-conduct regulations at issue in this case. The "principal consumer bankruptcy reform" in the 2005 legislation was the adoption of a "means testing" mechanism in-

tended to ensure that debtors who have the ability to repay at least some of their debts will do so, through a structured repayment plan entered under Chapter 13 of the Bankruptcy Code, instead of obtaining a complete discharge under Chapter 7. *House Report* 48; see *id.* at 2 (describing means testing as the "heart" of the 2005 Act's reform provisions). See generally 11 U.S.C. 109(b) and (e) (eligibility for Chapter 7 and Chapter 13).

Under the means test, a debtor's petition for complete relief under Chapter 7 is presumed to be abusive if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See 11 U.S.C. 707(b)(2)(A)(i) and (iii). If the court finds a petition to be abusive under this standard, it can dismiss the debtor's case or, with the debtor's consent, convert it to Chapter 13, which involves a repayment plan. 11 U.S.C. 707(b)(1). The means test, however, exacerbates the incentive for debtors to manipulate the system by "loading up" on certain debt in contemplation of filing, because payments on secured debts that qualify under Section 707(b)(2)(A)(iii) reduce the amount of the debtor's monthly income counted in the means test, and may therefore allow the debtor to remain eligible for a complete and immediate discharge of unsecured debt under Chapter 7.

C. Congress was accordingly concerned that the introduction of the means test would give attorneys an incentive to counsel their clients to take on additional debt before filing for bankruptcy. As one bankruptcy judge testified, "[t]he more debt that is incurred prior to filing, the more likely the debtor will qualify for chapter 7." *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin-*

istrative Law of the House Comm. on the Judiciary, 105th Cong., 2d Sess. Pt. I, at 25 (1998) (statement of Judge Randall J. Newsome). Thus, the bankruptcy judge testified that, "[p]erverse as it may seem, I can envision debtor's counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford (at least until the bankruptcy is filed) as a way of increasing their deductions under [the means test]." *Ibid.*; see also *Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. Pt. II, at 30 (1999) (statement of Judge William Brown). And as discussed above, see p. 3, *supra*, Congress credited evidence compiled by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals [and] problems associated with bankruptcy petition preparers." *House Report* 5 (quoting Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: The Civil Enforcement Initiative*, Am. Bankr. Inst. J., Sept. 2002, at 12).

Section 526(a)(4) is an important component of Congress's effort to prevent such efforts to circumvent of the means test. If a debtor is made financially worse off by following his attorney's unethical advice to incur more debt in an attempt to take advantage of the bankruptcy system, Section 526 provides him a remedy against the attorney, including both a refund of attorney's fees and actual damages. Section 526 also ensures that attorneys will be subject to a concrete sanction for giving such unethical advice; while state bars have a significant role to play in disciplining attorneys for un-

ethical conduct, the additional remedy provided by Section 526 is both more uniform and more certain. Section 526 also facilitates the client's cooperation through its fee-shifting provision, 11 U.S.C. 526(c)(2), whereas a state bar must rely on public-spirited complainants.

Section 526(a)(4) thus serves both a compensatory and a deterrent function within Congress's carefully designed framework for reducing well-documented ways of abusing the bankruptcy system. The court of appeals' decision invalidating that important tool raises an important question that is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2405

MILAVETZ, GALLOP & MILAVETZ, P.A.; ROBERT J. MILAVETZ; BARBARA N. NEVIN; JOHN DOE; MARY DOE, APPELLEES

v.

UNITED STATES OF AMERICA, APPELLANT

COMMERCIAL LAW LEAGUE OF AMERICA, AMICUS ON BEHALF OF APPELLEE

Submitted: Mar. 11, 2008
Filed: Sept. 4, 2008
(Corrected Sept. 23, 2008)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Before: BYE, SMITH, and COLLOTON, Circuit Judges.

SMITH, Circuit Judge.

Milavetz, Gallop & Milavetz, P.A., a law firm that practices bankruptcy law, the firm's president, a bank-

ruptcy attorney within the firm, and two clients[1] who sought bankruptcy advice from the firm brought suit against the United States seeking a declaratory judgment that certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)—11 U.S.C. §§ 526(a)(4) and 528(a)(4) and (b)(2)—did not apply to attorneys and law firms and are unconstitutional as applied to attorneys. The district court granted summary judgment to the plaintiffs and issued an order declaring that: (1) attorneys in the District of Minnesota were excluded from the definition of a "debt relief agency" as defined by BAPCPA; and (2) the challenged provisions were unconstitutional as applied to attorneys in the District of Minnesota. We affirm in part and reverse in part.

I. *Background*

On April 20, 2005, BAPCPA was signed into law, amending and adding multiple sections of the Bankruptcy Code ("the Code"). While some of these amendments became effective immediately, the vast majority became effective on October 17, 2005. *See* Pub. L. No. 109-8, § 1501(a), 119 Stat. 23 (2005) ("Except as otherwise provided in this Act, this Act and the amendments made by this act shall take effect 180 days after the date of enactment of this Act").

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[1] The client-plaintiffs sought prebankruptcy advice regarding the incurrence of additional debt prior to filing bankruptcy. The Bankruptcy Code precludes a debt relief agency from advising an assisted person from incurring additional debt in contemplation of bankruptcy. 11 U.S.C. § 526(a)(4). Thus, these client-plaintiffs are appearing on behalf of themselves and all others similarly situated who desire to exercise their First Amendment rights with attorneys regarding bankruptcy information.

One BAPCPA amendment added a new term, "debt relief agency," which is defined in § 101(12A) of the Code. 11 U.S.C. § 101(12A).[2] The amended Code restricts some actions of debt relief agencies, while requiring them to do others. *See* 11 U.S.C. § 526 ("Restrictions on debt relief agencies"); 11 U.S.C. § 528 ("Requirements for debt relief agencies"). For example, § 526(a)(4) bars a debt relief agency from advising a client "to incur more debt in contemplation" of a bankruptcy filing, 11 U.S.C. § 526(a)(4), while §§ 528(a)(4) and (b)(2) require debt relief agencies to include a disclosure in their bankruptcy-related advertisements directed to the general public declaring: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code[,]' or a substantially similar statement." 11 U.S.C. § 528(a)(4), (b)(2). The plaintiffs sought alternative remedies. First, plaintiffs requested a declaratory judgment that attorneys did not fall within the definition of "debt relief agency." If the court determined that attorneys fell within the definition of debt relief agency, they challenged the constitutionality of §§ 526(a)(4) and 528(a)(4) and (b)(2), as applied to attorneys.

II. *Discussion*

A. *Debt Relief Agencies*

Initially, we address whether attorneys fall within the Code's definition of debt relief agencies. If they do not, we will have no need to address the constitutionality of §§ 526(a)(4) and 528(a)(4) and (b)(2), which only apply to debt relief agencies. *See Holtan v. Black*, 838 F.2d

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[2] Prior to BAPCPA, the term "debt relief agency" did not exist in the Code.

984, 986 n.3 (8th Cir. 1988) ("Federal courts must avoid passing upon constitutional questions unless they are essential to the disposition of the issues before them.") (citing *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of necessity of deciding them")).

> The term "debt relief agency" means *any person* who provides *any bankruptcy assistance* to an *assisted person* in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—
>
> (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
>
> (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
>
> (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
>
> (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

> (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

11 U.S.C. § 101(12A) (emphasis added).

Further, the Code defines the term "bankruptcy assistance" to mean:

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, *advice, counsel*, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another *or providing legal representation* with respect to a case or proceeding under this title.

Id. at § 101(4A) (emphasis added).

Additionally, the Code defines the term "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250."[3] *Id.* at § 101(3).

The plaintiffs argue that attorneys are not "debt relief agencies" because the definition of debt relief agencies makes no direct reference to attorneys, even though "attorney" is a defined term in the Code, *id.* at § 101(4),[4] but does include the term "bankruptcy petition pre-

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[3] When this suit was commenced, the dollar amount in § 101(3) was $150,000. Subsequently, on April 1, 2007, the amount was adjusted pursuant to 11 U.S.C. § 104. The change, however, is inconsequential for purposes of this case.

[4] "The term 'attorney' means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4). This definition makes no reference to "debt relief agencies" or to subsection (12A).

parer" which, by definition, excludes debtor's attorneys and their staff. *See* 11 U.S.C. § 110(a)(1).[5] Plaintiffs contend that the omission of any reference to attorneys or lawyers while specifically including bankruptcy petition preparers shows Congress's intent to exclude attorneys from the definition of debt relief agencies. Because the plaintiffs contend that constitutionality issues arise in §§ 526(a)(4) and 528(a)(4) and (b)(2) if attorneys are debt relief agencies, they assert that the doctrine of constitutional avoidance should be used to interpret "debt relief agency" to exclude attorneys and thus avoid the potential constitutional issues.

Conversely, the government argues that attorneys are debt relief agencies because the broadly worded definition of the term plainly includes attorneys, *see* 11 U.S.C. § 101(12A) (defining "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment"), and providing legal representation is included in definition of bankruptcy assistance. *See id.* at 101(4A) ("bankruptcy assistance means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing . . . advice, counsel, . . . or legal representation with respect to a case or proceeding under this title").

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[5] "'[B]ankruptcy petition preparer' means a person, *other than an attorney for the debtor or an employee of such attorney* under the direct supervision of such attorney, who prepares for compensation a document for filing [by the debtor in connection with his bankruptcy case]." 11 U.S.C. § 110(a)(1) (emphasis added); *see also id.* at § 110(a)(2) (defining "document for filing" as used in § 110(a)(1)).

Whether attorneys fall within the Code's definition of debt relief agencies is an issue of first impression among the Courts of Appeals. Although the plain language of the definition appears to include bankruptcy attorneys and does not appear to be ambiguous, lower "[c]ourts that have addressed the issue of whether attorneys are debt relief agencies have not been unanimous." *In re Irons*, 379 B.R. 680, 685 (Bankr. S.D. Tex. 2007) (citing cases). Nevertheless, the majority of courts have held that compensated bankruptcy attorneys are debt relief agencies as that term is defined in the Code. *Id.* (finding debtor's counsel was a debt relief agency); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006) (same); *In re Robinson*, 368 B.R. 492 (Bankr. E.D. Va. 2007) (finding debtor's counsel was debt relief agency); *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006) (finding that bankruptcy attorneys are debt relief agencies); *In re Norman*, No. 06-70859, 2006 WL 3053309 (Bankr. E.D. Va. 2006) (finding debtor's counsel qualified as a debt relief agency); *but see In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005) (holding that attorneys are not debt relief agencies); *In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007) (finding that attorneys, generally, are not debt relief agencies, but ruling that debtor's counsel in case at bar was not a debt relief agency because service was provided pro bono and thus counsel did not receive valuable consideration in return for the bankruptcy assistance provided).

In this case, the district court acknowledged that the definition of debt relief agency, "at first glance," appeared to include attorneys, but it ultimately relied on the doctrine of constitutional avoidance to conclude that attorneys did not fall within the definition because if they did portions of §§ 526 and 528 would be unconstitu-

tional as applied to attorneys. The doctrine of constitutional avoidance dictates that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, if interpreting "debt relief agency" to include attorneys "would raise serious constitutional problems," then we should look for another interpretation "that may fairly be ascribed" to the definition that does not raise these concerns. *Id.* at 576-77. We will not, however, adopt an alternative interpretation that is "plainly contrary to the intent of Congress." *Id.* at 575.

"We review the district court's statutory interpretation de novo." *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 914 (8th Cir. 2008). To interpret the statute we first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "If so, we apply the plain language of the statute." *Id.* "A mere disagreement among litigants over the meaning of the statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999).

The plain reading of the definition of debt relief agency, and the defined terms that make up that definition, leads us to conclude that attorneys who provide "bankruptcy assistance" to "assisted persons" are unambiguously included in the definition of "debt relief agen-

cies." *See Olsen*, 350 B.R. at 912 ("[I]t is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of 'debt relief agency,'" and "[t]hus, further use of the tools of statutory construction is not necessary"). The statutory language sweeps broadly and clearly covers the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision.

Congress specifically listed five exclusions from the definition of "debt relief agency," and if it meant to exclude attorneys from that definition it could have explicitly done so. *Id.*; 11 U.S.C. § 101(12A). Moreover, if attorneys were not included in the definition of debt relief agencies, Congress would have had no reason to include § 526(d)(2), which expressly provides that nothing in §§ 526, 527, or 528 (the sections covering debt relief agencies) "shall be deemed to limit or curtail the authority or ability of a State . . . to determine and enforce qualifications for the practice of law under the laws of that State; or of a Federal court to determine and enforce the qualifications for the practice of law before that court." 11 U.S.C. § 526(d)(2)(A) and (B). The legislative history provides further indication that attorneys are included in the definition. *See* H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 4 (April 8, 2005) ("The bill's consumer protections include provisions strengthening professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases") (emphasis added).[6]

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[6] Additionally, while we recognize that the Supreme Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest [a statutory interpretation]," *Lockhart v. United States*, 546 U.S. 142 (2005) (internal quotation marks and brackets

Because attorneys were not specifically excluded from the definition of debt relief agencies, we hold that attorneys that provide "bankruptcy assistance" to "assisted persons" are "debt relief agencies" as that term is defined by the Code. Interpreting the definition of "debt relief agency" to exclude bankruptcy attorneys would be contrary to Congress's intent.

B. *Constitutionality of § 526(a)(4)*

Having concluded that attorneys providing bankruptcy assistance to assisted persons are debt relief agencies under the Code, we now must determine whether the challenged provisions placing restrictions and requirements on debt relief agencies are unconstitutionally overbroad as applied to these types of attorneys.[7] One of the sections challenged by the plaintiffs in this case is § 526(a)(4), which states:

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omitted), we note that on March 9, 2005, Senator Feingold proposed amendment No. 93 to Congress which would have excluded attorneys from the definition of debt relief agencies, *see* 151 Cong. Rec. S2306-02, 2316 (daily ed. Mar. 9, 2005) (statement by Sen. Feingold) ("This amendment would exclude lawyers from the provisions dealing with 'debt relief agencies' . . . ."), but the Senate did not address the proposal.

[7] Even though a more narrowly drawn version of § 526(a)(4) would likely be valid as applied to the plaintiffs in this case, our analysis applies to all attorneys falling within the definition of debt relief agencies, not merely the plaintiff-attorneys. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984) (explaining that the overbreadth doctrine allows a party to challenge a broadly written statute "even though a more narrowly drawn statute would be valid as applied to the party in the case," as "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations and citation omitted).

(a) A debt relief agency shall not—

. . .

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a)(4).

Plaintiffs assert that the prohibition against advising an assisted person or prospective assisted person to incur more debt in contemplation of bankruptcy violates the First Amendment. The parties disagree as to the level of scrutiny we apply to the constitutional analysis of this limitation on speech. Plaintiffs claim that we should review the constitutionality of § 526(a)(4) under the strict scrutiny standard as the restriction on attorney advice is content-based. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Under strict scrutiny review, the government has the burden to prove that the constraints on speech are supported by a compelling governmental interest and are narrowly tailored, such that the statutory effect does not prohibit any more speech than is necessary to serve the governmental interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

In contrast, the government argues that § 526(a)(4)'s restrictions are a type of ethical regulation, invoking the more lenient standard outlined in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Under the *Gentile* standard, we would balance the First Amendment rights of the attorneys against the government's legitimate interest in regulating the activity in question—the prohibition of advising assisted persons to incur more debt in contemplation of bankruptcy—and then determine whether the regulations impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075.

According to the government, § 526(a)(4) should be interpreted as merely preventing an attorney from advising an assisted person (or prospective assisted person) to take on more debt in contemplation of bankruptcy when the incurrence of such debt is done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge. However, the plain language of the statute does not permit this narrow interpretation. Rather, § 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person is contemplating bankruptcy. The statute's blanket prohibition applies even if the additional debt would not be discharged during the bankruptcy proceedings. 11 U.S.C. § 526(a)(4).

Thus, regardless of whether the government's interest in prohibiting the speech was legitimate (*Gentile* standard) or compelling (strict scrutiny standard), § 526(a)(4) is unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies because it is not narrowly tailored, nor narrowly

and necessarily limited, to restrict only that speech that the government has an interest in restricting. Instead, § 526(a)(4) prohibits attorneys classified as debt relief agencies from advising any assisted person to incur any additional debt in contemplation of bankruptcy; this prohibition would include advice constituting prudent pre-bankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws. Section 526(a)(4), as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited by the Bankruptcy Code or other applicable law.[8]

There are certain situations where it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt in contemplation of bankruptcy. However, under § 526(a)(4)'s plain language an attorney is prohibited from providing this beneficial advice—even if the advice could help the assisted person avoid filing for bankruptcy altogether. For instance, it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments. This could free up additional funds to pay off other debts and avoid the need for filing bank-

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[8] Several bankruptcy courts are in agreement with our decision. *See Zelotes*, 363 B.R. at 667 ("Because § 526(a)(4) is not sufficiently 'narrowly tailored to achieve the desired objective,' it is unconstitutional as applied to bankruptcy attorneys."); *Hersh*, 347 B.R. at 25 (concluding that § 526(a)(4) is unconstitutional because: "(1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions," and therefore imposes "limitations on speech beyond what is 'narrow and necessary'"); *Olsen*, 350 B.R. at 916 ("[S]ection 526(a)(4) is overly restrictive in violation of the First Amendment" even if reviewed under *Gentile* standard).

ruptcy all together. *Hersh*, 347 B.R. at 24. Moreover, it may be in the client's best interest to incur additional debt to purchase a reliable automobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work, which will likely be necessary to maintain the debtor's payments in bankruptcy. *Id.* Incurring these types of additional secured debt, which would often survive or could be reaffirmed by the debtor, may be in the debtor's best interest without harming the creditors.[9]

Factual scenarios other than these few hypothetical situations no doubt exist and may further illustrate why incurring additional debt in contemplation of bankruptcy may not be abusive or harmful to creditors. Nonetheless, § 526(a)(4), as written, does not allow attorneys falling within the definition of debt relief agencies to advise assisted persons (or prospective assisted persons)—i.e. clients (or prospective clients) meeting the definition of assisted person—to incur such debt. Thus, § 526(a)(4) is not narrowly tailored nor narrowly and necessarily limited to prevent only that speech which the government has an interest in restricting. Therefore,

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[9] *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (Summer 2005).

> [Section 526(a)(4)'s] prohibition is particularly troubling when it might be completely legal and even desirable for the client to incur such debt. For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case. For example, the client may intend to keep all payments fully current and to reaffirm such debt once the case is filed.

we hold that § 526(a)(4) is substantially overbroad,[10] and unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined in the Code.

C. *Constitutionality of § 528(a)(4) and (b)(2)*

The plaintiffs also challenged the constitutionality of §§ 528(a)(4) and (b)(2)(B), claiming that the advertising disclosure requirements mandated by those sections violate the First Amendment rights of bankruptcy attorneys through compelled speech. The disclosure requirements of § 528(a)(4) are supplemented by § 528(a)(3). These sections state:

> (a) A debt relief agency shall—
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> . . .
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> (3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and
>
> (4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file ... bankruptcy

[10] *See Veneklase v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001) ("For us to find a statute unconstitutionally overbroad, its 'overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

> relief under the Bankruptcy Code." or [*sic*] a substantially similar statement.

11 U.S.C. § 528 (a)(3), (4).

Similarly, § 528(b)(2)(B) states:

> (2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall—
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> . . .
>
> (B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

11 U.S.C. § 528(b)(2)(B).

As both §§ 528(a)(4) and (b)(2)(B) require debt relief agencies—which includes attorneys providing bankruptcy assistance to assisted persons—to disclose in their advertising that "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or some substantially similar statement," the statutes compel speech that, similar to a restriction on speech, receives constitutional protection under the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (stating that "[l]aws that compel speak-

ers to utter or distribute speech bearing a particular message are subject to" constitutional scrutiny).

The government contends that Congress enacted § 528's disclosure requirements to address problems with deceitful or unclear advertising by bankruptcy attorneys, bankruptcy petition preparers, or other debt relief entities. This position is supported by legislative history. *See* 151 Cong. Rec. H2063-01, 2066 (daily ed. Apr. 14, 2005) (statement by Rep. Moran) (stating that certain BAPCPA provisions are intended to "[p]revent deceptive and fraudulent advertising practices by debt relief agencies . . ."). But before we can determine whether the government's justification for mandating the disclosures passes constitutional scrutiny, we must first decide the appropriate standard for reviewing the constitutionality of the required disclosures.

We find guidance for this issue from the Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). In *Zauderer*, the Supreme Court considered the constitutionality of a state bar disciplinary regulation requiring attorneys that advertised contingent-fee representation to disclose in their advertisements that clients may still have to bear certain costs even if the case was unsuccessful. *Id.* at 633. As the regulation only required an attorney to "include in his advertising purely factual and uncontroversial information about the terms under which his services w[ould] be available," and "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [the attorney's] constitutionally protected interest in not providing any particular factual information in his advertising is minimal."

Id. at 651. The Court "recognize[d] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but held "that an advertiser's rights are adequately protected as long as disclosure requirements are *reasonably related* to the State's interest in preventing deception of consumers." *Id.* (emphasis added).

On the other hand, restrictions on non-deceptive advertising are reviewed under intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) (ruling that restrictions on commercial speech that is neither misleading nor related to unlawful activity must assert a "substantial interest to be achieved by [the] restrictions" and "the restrictions must directly advance the state interest involved"). Under this standard, the limitation must be narrowly drawn. *Id.* ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive").

The district court in this case reviewed § 528's disclosure requirements under the intermediate scrutiny standard, but we conclude that rational basis review is proper. The disclosure requirements here, like those in *Zauderer*, are intended to avoid potentially deceptive advertising. *See Zauderer*, 471 U.S. at 651, n.14 (rejecting a more strict analysis of the disclosure requirements at issue in that case, and noting that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . .").

By definition, debt relief agencies provide bankruptcy assistance to assisted persons (or prospective assisted persons) "with respect to a case or proceeding under [the Bankruptcy Code]." 11 U.S.C. §§ 101(4A), (12A). Section 528 generally requires debt relief agencies to disclose on its advertisements of bankruptcy assistance services directed to the general public that their services do in fact relate to bankruptcy and that they assist people in filing for bankruptcy. 11 U.S.C. § 528. As in *Zauderer*, the plaintiffs' "constitutionally protected interest in not providing [such] factual information in [their] advertising is minimal." 471 U.S. at 650. Further, the disclosure requirements are reasonably and rationally related to the government's interest in preventing the deception of consumer debtors, as the disclosure requirements are directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy.[11]

Section 528 requires debt relief agencies to disclose: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement," in all of their bankruptcy-

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[11] Without ruling on the issue, we note that at least one lower court has held that § 528's disclosure requirements are constitutionally valid even under the stricter intermediate scrutiny analysis, as the government's interest in protecting consumer debtors from misleading advertising is substantial, the disclosure requirements placed on bankruptcy attorneys directly advances the government's asserted interest, and the disclosure requirements are narrowly drawn to serve the government's interest. *See Olsen*, 350 B.R. at 920 (concluding that § 528 "passes constitutional muster" under either rational basis review or intermediate scrutiny review).

related advertising materials directed to the general public. 11 U.S.C. §§ 528(a)(4), (b)(2). The requirement does not prevent those attorneys meeting the definition of debt relief agencies "from conveying information to the public; it . . . only require[s] them to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. Moreover, if any of these attorneys are concerned that the required disclosures will confuse the public, we note that nothing in the Code prevents them from identifying themselves in their advertisements as both attorneys and debt relief agencies. *Olsen*, 350 B.R. at 920. Simply put, attorneys that provide bankruptcy assistance to assisted persons are debt relief agencies under the Code, and the disclosure requirements of § 528 only require those attorneys to disclose factually correct statements on their advertising.[12] This does not violate the

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[12] We recognize that the broad definitions of debt relief agency, bankruptcy assistance, and assisted persons, might result in certain attorneys meeting the definition of debt relief agencies even though they do not represent debtors in bankruptcy nor help people file for bankruptcy relief under the Code. Nevertheless, these attorneys are still subjected to the disclosure requirements of § 528(a)(4) when they advertise "bankruptcy assistance services or . . . the benefits of bankruptcy directed to the general public," 11 U.S.C. § 528(a)(3), (4), or when they advertise to the general public that they "provide[] assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." *Id.* at § 528(b)(2). But because § 528 permits a "substantially similar" disclosure to the one suggested by the Code, these attorneys can and should tailor their advertisement disclosure statements to factually represent the "bankruptcy assistance" they provide. These tailored disclosures will meet the requirements of § 528(a)(4) and (b)(2) as long as they are "substantially similar" to the suggested disclosure, a decision which will require a case-by-case determination. *See Olsen*, 350 B.R. at 919-20 (dismissing plaintiffs' claim that § 528 was uncon-

First Amendment. *Id.*; *see also In re Robinson*, 368 B.R. at 500-502 (finding that debtor's counsel was a debt relief agency subject to the strictures of § 528, and that § 528(a)(1)'s requirement for a written contract is constitutional); *In re Norman*, 2006 WL 3053309 at *4 (finding that debtor's counsel qualified as a debt relief agency and thus must comply with the requirements of § 528(a)(1)).

The challenged sections of § 528 only require debt relief agencies to include a disclosure on certain advertisements. Although less intrusive means may be conceivable to prevent deceptive advertising, § 528's disclosure requirements are reasonably related to the government's interest in protecting consumer debtors from deceptive advertising, and thus the section passes constitutional muster.

III. *Conclusion*

In sum, attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, and § 526(a)(4) is unconstitutional as applied to these attorneys, but §§ 528(a)(4) and (b)(2) are constitutional. Accordingly, we affirm in part and reverse in part.

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stitutional, rejecting argument that attorney who met definition of debt relief agency but did not represent bankruptcy debtors was precluded from § 528's disclosure requirements because § 528 permits a "substantially similar" disclosure, which could be tailored to disclose that attorney advised clients about bankruptcy assistance matters but did not represent people in bankruptcy or file bankruptcy petitions, and stating that whether disclosure was "substantially similar" would require case-by-case determination).

COLLOTON, Circuit Judge, concurring in part and dissenting in part.

I concur in all but Part II.B of the opinion of the court. I disagree, however, with the court's holding that 11 U.S.C. § 526(a)(4) is unconstitutionally overbroad in violation of the First Amendment, and I would therefore reverse the district court's decision declaring this statutory provision unconstitutional.

Milavetz, Gallop, & Milavetz, P.A., mounts a facial attack on § 526(a)(4), arguing that the section's potential application to attorneys in hypothetical situations requires that the statute be declared impermissibly overbroad and unconstitutional. This case involves a facial challenge in the First Amendment context, "under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 n.6 (2008). This "overbreadth doctrine," however, is "strong medicine that is used sparingly and only as a last resort." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (internal quotations omitted). It should be applied only when there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The Supreme Court recently emphasized that it has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the stat-

ute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).[13]

To resolve the constitutional challenge brought by Milavetz, we must first construe the disputed statute. When presented with a constitutional challenge to an Act of Congress, we have not only the power, but the duty, to adopt a narrowing construction that will avoid constitutional difficulties whenever possible. *Boos v. Barry*, 485 U.S. 312, 330-31 (1988). In *Boos*, for example, the Court considered a provision of federal legislation that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police." *Id.* at 329 (internal quotation omitted). The Court observed that "*[s]tanding alone*, this text is problematic because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330 (first emphasis

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[13] The district court purported to consider only an "as-applied" challenge to § 526(a)(4), rather than an overbreadth challenge, and ultimately declared the section "unconstitutional as applied to attorneys." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 766 n.4, 769 (D. Minn. 2006). The majority correctly recognizes that the district court's approach is really an overbreadth analysis, and considers the statute under that framework. *See ante*, at 9 & n.7, 11, 13 & n.10. The "as applied" method of analysis, by contrast, considers the statute's application to a "particular claimant" based on "harm caused to the litigating party." *Turchick v. United States*, 561 F.2d 719, 721 n.3 (8th Cir. 1977). "The 'as applied' method vindicates a claimant whose conduct is within the First Amendment but invalidates the challenged statute *only to the extent of the impermissible application*." *Id.* (emphasis added). The district court and the majority have declared § 526(a)(4) unconstitutional in *all* of its applications to *all* attorneys, and the supporting reasoning is thus consistent with "facial overbreadth analysis." *Id.* (punctuation omitted).

added). Nonetheless, citing the "duty to avoid constitutional difficulties by [adopting a narrowing construction] if such a construction is fairly possible," the Court construed the statute narrowly to permit the dispersal of only congregations that are directed at an embassy, and to allow dispersal "only when the police reasonably believe that a threat to the security or peace of the embassy is present." *Id.* at 330-31 (internal quotation omitted). Similarly, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court emphasized that "it is incumbent upon" a federal court to read a statute to eliminate constitutional doubts, "so long as such a reading is not plainly contrary to the intent of Congress." *Id.* at 78.

The challenged provision in this case provides in part that "[a] debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title." 11 U.S.C. § 526(a)(4). Milavetz argues that according to this provision, a debt relief agency may not advise a client to incur *any* debt for *any* purpose when the client is contemplating the filing of a petition for bankruptcy. As such, Milavetz contends that an attorney could be sanctioned for "fulfilling his duty to his client to give legal and appropriate advice not otherwise prohibited by the Bankruptcy Code." (Brief of Appellee 30). Even under Milavetz's broad construction of the statute, a facial challenge resting on a "few hypothetical situations," *ante*, at [14a], is unlikely to justify invalidating a statute in *all* of its applications, because "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, 466 U.S. at 800.

It is unnecessary to resolve whether § 526(a)(4) is impermissibly overbroad when given its broadest reading, however, because the government suggests an acceptable narrowing construction of the statute that would avoid most constitutional difficulties. The government contends that "in contemplation of" filing for bankruptcy is a term of art that denotes an action taken with the intent to abuse the protections of bankruptcy laws. Under this view, the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system.

The text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction. Particularly given the latitude of federal courts to narrow a text to avoid constitutional difficulties, *see Boos*, 485 U.S. at 330-31, the words "in contemplation of . . . filing a case" need not create impermissible overbreadth. Rather, we may recognize that the phrase "in contemplation of" has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system. Black's Law Dictionary reflects this understanding, defining "contemplation of bankruptcy" as "the thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*." *Black's Law Dictionary* 336 (8th ed. 2004) (emphasis added). American and English authorities construing the bankruptcy laws also support the proposition that the words "in contemplation of" may be understood to require an intent to abuse the bankruptcy laws. *In re Pearce*, 19 F. Cas. 50, 53 (D. Vt. 1843) (No. 10873) (concluding that an act was done "in contemplation of bankruptcy" if it was done "in anticipa-

tion of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy.*") (emphasis added); *Morgan v. Brundrett*, 5 Barn. & Ad. 289, 296, 110 Eng. Rep. 798, 801 (K.B. 1833) (Parke, J.) (interpreting "in contemplation of bankruptcy" to mean that "the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy."); *Fidgeon v. Sharpe*, 5 Taunt. 539, 545-46, 128 Eng. Rep. 800, 802-03 (C.P. 1814) (Gibbs, C.J.) (An act made in contemplation of bankruptcy "must be intended in fraud of the bankrupt laws."); *cf. Buckingham v. McLean*, 54 U.S. 151, 167 (1851) ("To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced."); *id.* at 169 (relying on English bankruptcy decisions as instructive authority on meaning of the former Bankrupt Act). Our duty to construe the statute to avoid constitutional difficulties counsels that we should look to these authorities for a plausible alternative to the broad construction urged by Milavetz.

The structure of § 526(a)(4) also supports a narrowing construction. The prohibitions of this statute can be enforced only through the civil remedies provided in § 526(c). An attorney who violates § 526(a)(4) can be sanctioned in just three situations: if a debtor sues the attorney for the available remedies—remittal of fees, actual damages, and reasonable attorney's fees and costs; if a state attorney general sues for a resident's actual damages; or if a court finds that the attorney in-

tentionally violated § 526(a)(4), and chooses to "impose an appropriate civil penalty." 11 U.S.C. § 526(c). The remedies for a violation thus emphasize actual damages. But legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all. If an attorney advises a debtor to refinance his home to lower mortgage payments, or to purchase a reliable car to enable him to pay off his debts, *see ante*, at [13a-14a], then a debtor following that advice would suffer no damage. There is no reason to believe that a client could recover the remittal of attorney's fees or that a court would find a civil penalty "appropriate" as a remedy for legal advice that *benefits* both the debtor *and* his creditors. Rather, a debtor is likely to have a remedy against an attorney only in the case of an abusive bankruptcy petition, where the debtor may suffer damages if the petition is dismissed as abusive, *see* 11 U.S.C. § 707(b)(1), and where an attorney general or a court has reason to seek or impose sanctions against an abusive debt relief agency. The remedial focus of § 526 thus bolsters the proposition that § 526(a)(4) was aimed only at advice given by a debt relief agency that is designed to abuse the bankruptcy process.

The incorporation of an abusive purpose requirement into § 526(a)(4) is also consonant with the evident purpose of the statute. The government argues, and Milavetz acknowledges, that a principal goal of Congress in passing the statute was to "preclude debtors from taking on more debt knowing that it will later be discharged during bankruptcy." (Brief of Appellee 34). A narrowing construction of § 526(a)(4) is in accord with expressions of desire in the legislative history to address "misconduct by attorneys and other professionals," and

"abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." H.R. Rep. No. 109-31, pt. 1, at 5, 15 (2005) (internal quotation omitted), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92, 101. Milavetz itself argues that a broad construction of § 526(a)(4) "goes beyond" this congressional purpose, and is "absurd," because it would prevent an attorney from advising a client to take actions that might avoid the need for filing bankruptcy altogether. (Brief of Appellee 34). Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that one party says is absurd, that the other party says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

For these reasons, I would reverse the district court's decision declaring unconstitutional the provision codified at 11 U.S.C. § 526(a)(4).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

No. 05-CV-2626 (JMR/FLN)

MILAVETZ, GALLOP & MILAVETZ P.A., ROBERT J. MILAVETZ, BARBARA N. NEVIN, JOHN DOE, AND MARY DOE

v.

UNITED STATES OF AMERICA

[Dec. 7, 2006]

ORDER

Plaintiffs ask the Court to declare portions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") unconstitutional. Defendant, United States of America ("the government") moves to dismiss for failure to state a claim upon which relief can be granted. Defendant's motion is denied; the debt relief agency sections of BAPCPA unconstitutionally impinge on attorneys' First Amendment rights.

I. *Background*

On April 20, 2005, BAPCPA was signed into law, and became effective on October 17, 2005. Among its terms, BAPCPA defines a new category of bankruptcy service

provider called a "debt relief agency." 11 U.S.C. § 101(12A) (2005). The law forbids debt relief agencies from doing certain things, and requires them to do others. This lawsuit challenges a number of these provisions.

BAPCPA bars a debt relief agency from advising a client "to incur more debt in contemplation" of a bankruptcy filing. 11 U.S.C. § 526(a)(4). BAPCPA further requires that debt relief agencies' advertisements declare: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code," or a substantially similar statement. 11 U.S.C. § 528(a)(4), (b)(2).

Plaintiffs are bankruptcy attorneys, their law firm, and two unnamed members of the public. Their attack on the statute is based on the First Amendment to the United States Constitution. They allege BAPCPA's debt relief agency provisions are unconstitutional as applied to them. They, initially, claim BAPCPA's regulation of attorneys' advice violates the First Amendment. Next, they claim BAPCPA's advertising requirements contravene the First Amendment.[1] Ultimately, they contend Congress did not intend the debt relief agency requirements to apply to attorneys. The government moves to dismiss plaintiffs' First Amendment claims pursuant to Rule 12(b)(6) of the Federal Rules of

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[1] In a footnote, the government asks whether plaintiffs have standing to bring these claims, since they are in no danger of immediate harm. The government's query is misplaced; plaintiffs claim BAPCPA's debt relief agency sections both stifle and compel their speech, in violation of the U.S. Constitution. First Amendment jurisprudence makes clear that a claim that a law has a potential chilling effect on speech establishes standing. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988).

Civil Procedure ("Fed. R. Civ. P."). The government's motion is denied.

II. *Discussion*

A. *Motion to Dismiss*

A Rule 12(b)(6) motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. *See Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992). In considering such a motion, the motion, the court construes the complaint, and all of its reasonable inferences, most favorably to plaintiff. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

B. *Unnamed Plaintiffs*

The complaint purports to set out the claims of two unnamed parties: John Doe and Mary Doe. The government denies there is any legal basis for anonymous plaintiffs in this lawsuit. Indeed, Fed. R. Civ. P. 10(a) is explicit: a complaint "shall include the names of all the parties." Notwithstanding Rule 10(a), plaintiffs claim their case falls within a limited realm of cases in which other interests—i.e., privacy and concern about embarrassment—outweigh the public's interest in open disclosure. Plaintiffs are incorrect.

There is a strong presumption against allowing parties to use a pseudonym. *See, e.g., Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997); *Doe v. Frank*, 951 F.2d 320, 323-24 (11th Cir. 1992); *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979). The reasons are obvious and compelling: identification of litigants is recognized as important in a public proceeding. *See Blue Cross*, 112 F.3d at 872. A

party who invokes the judicial powers of the United States invites public scrutiny. "The people have a right to know who is using their courts." *Id.*

Limited exceptions to the party-publicity rule exist. Case law has recognized three factors which, if present, might support anonymity. They have been found when "(1) plaintiffs seeking anonymity were suing to challenge governmental activity; (2) prosecution of the suit compelled plaintiffs to disclose information 'of the utmost intimacy;' and (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution." *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (quoting *Wynne & Jaffe*, 599 F.2d at 712-13). Although the listed factors are not exhaustive, they provide valuable guidance.

While the first factor is present here, the third is not. Plaintiffs argue their "wish to obtain legal advice from [plaintiff] attorneys . . . about prebankruptcy planning and filing bankruptcy" (1st Am. Compl. ¶ 10) suffices for the second factor. According to the Doe parties, the "financial situations of private citizens [are] clearly a matter of utmost intimacy, especially when they feel the need to seek advice about bankruptcy." (Pl.'s Brief 23).

Certainly, those facing bankruptcy are in financial straits; but that does not resolve the issue. Plaintiffs offer no case law to support their claim that merely seeking bankruptcy or financial advice is the kind of intimate personal information typically protected by the court. Bankruptcy is a public proceeding; the Doe plaintiffs are disclosing no medical information or deeply personal questions surrounding human reproduction or matters of that nature.

The Court finds the bankruptcy-seeking plaintiffs' interest in their financial privacy is outweighed by the public's stronger interest in maintaining open trials. Accordingly, the Doe plaintiffs shall amend their complaint to include their real names within 10 days of the date of this Order, or their claims will be dismissed.

C. *Constitutional Challenges*

1. *Attorney Advice: Section 526(a)(4)*

Plaintiffs claim BAPCPA's § 526(a)(4), titled "[r]estrictions on debt relief agencies," has "a chilling effect upon lawyers," in violation of their First Amendment rights. (1st Am. Compl. ¶ 39.) Section [526(a)(4)] states:

> A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a)(4).

The parties disagree as to the standard of review applied to the constitutional analysis of this section. Plaintiffs claim the standard of review for a restriction on lawful and truthful attorney advice is strict scrutiny. The government replies that § 526(a)(4)'s restrictions are merely a species of ethical regulation, invoking the more lenient standard outlined in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Under *Gentile*, the Court would balance the First Amendment rights of attorneys against the government's legitimate interest in regulating the activity in question, and then determine whether

the regulations impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075. The Court rejects the government's proposed standard.

The "ethical rule" of which the government speaks appears to exist only in its pleadings; the statute discloses no quasi-religious or ethical principle. The government "cannot foreclose the exercise of constitutional rights by mere labels." See *NAACP v. Button*, 371 U.S. 415, 429 (1963). While the section is certainly a rule, nothing in § 526 alludes to ethics. The section is titled "Restrictions on debt relief agencies," and plainly prohibits certain acts. The advice the Section forecloses may be potentially advantageous to creditors, but this does not make it equivalent to ethics either in logic or in law.

When fairly viewed, the Court finds § 526(a)(4) to be a content-based regulation of attorney speech—it restricts attorneys from giving particular information and advice to their clients. Attorneys are forbidden to advise their clients concerning an entire subject—incurring more debt in contemplation of filing for bankruptcy. This is a plain regulation of speech. Beyond this, the forbidden speech trenches on two other important areas of concern.

First, the lawyer's advice to take on certain additional financial obligations in contemplation of bankruptcy may well be in the client's best interest.[2] A law

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[2] For example, it may be in the client's interest to obtain or refinance a home mortgage prior to filing bankruptcy, because one who has declared bankruptcy may well be denied a lower interest rate after the filing. If the client gets a lower rate mortgage, the refinanced mortgage may have smaller payments which could forestall, or even prevent the bankruptcy in the first place. Similar arguments can be made concern-

yer's highest duty is to the client, and the statute's forbidden advice may indeed be helpful to the client. Secondly, this statute does not restrict false statements—arguably implicating some "ethical" precept—it forbids truthful and possibly efficacious advice. If this is the government's view of legal ethics, it is a form of ethics unfamiliar to the Court.

As the United States Supreme Court has explained, "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes th[e] essential [First Amendment] right[s]" of private citizens. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). For this reason, "governmental control over the content of messages expressed by private individuals" is unconstitutional except in narrow circumstances. *Id.*

As the Court finds § 526(a)(4) to be a content-based restriction on protected speech, it is subject to strict scrutiny. *Id.* Such a restriction can only survive if (1) narrowly tailored to achieve (2) a compelling state interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The Court finds the government has failed to meet its burden on the first point—§ 526(a)(4) is not narrowly tailored.

The government suggests § 526(a)(4) advances two compelling interests. First, it asserts an interest in protecting creditors. According to the government, § 526(a)(4)'s prohibition discourages prospective bankrupts from accumulating debt in a particular fashion,

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ing automobile loans, or incases where a client needs to co-sign undischargeable student loans. *See Hersh v. United States*, 347 B.R. 19, 24 (N.D. Tex. 2006).

thus deterring debtors from "gaming" the means test by improperly enlarging pre-existing debt, thereby diluting the assets of the bankruptcy estate otherwise available to creditors. Second, it claims § 526(a)(4) protects debtors from attorneys who might lead them to abusive practices which could ultimately result in a denial of discharge of debts under § 523(a)(2)(c). Finally, the government argues that § 523(a)(2)(c) protects the integrity of the bankruptcy system.

Even if the Court assumes the asserted interests are compelling, the restriction is not narrowly-tailored. The government claims the section is narrowly tailored because "it does not limit more speech than is necessary to accomplish this purpose." (Def.'s Brief 25.) The government is mistaken.

Attorneys have a First Amendment right—let alone an established professional ethical duty—to advise and zealously represent their clients. *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 548-549 (2001). Section 526(a)(4) bars an attorney from advising a client to incur any kind of debt, including legitimate debt, in contemplation of bankruptcy. The lawyer has no duty to assist creditors—who are scarcely without their own resources, and may indeed have contributed to the potential-bankrupt's straits by making credit easy to obtain. The attorney's only duty is to the client, and to the law.

Incurring debt on the eve of bankruptcy can scarcely be considered malum in se. To the contrary, for some individuals incurring further obligations, even those which must be adjusted or set aside in the bankruptcy, may be financially prudent. "For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a

lower interest rate, or to buy a new car" before filing for bankruptcy. Erwin Chemerinksy, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 578 (2005). If a client intends to reaffirm the debt after filing bankruptcy, there is no prejudice to the bankruptcy process. BAPCPA's § 526(a)(4) limitation on speech extends beyond any need to protect the bankruptcy process.[3] A lawyer who represents consumers contemplating bankruptcy bears the duty of zealous representation. Conversely, Congress does not have the power "to effect [a] serious and fundamental restriction on advocacy of attorneys." *See Velazquez*, 531 U.S. at 534. If upheld, this law would prevent lawyers from adequately and competently advising their clients. As such, it unconstitutionally impinges on expressions protected by the First Amendment of the Constitution.[4]

2. *Advertising: Section 528(a)(4), (b)(2)*

Plaintiffs challenge BAPCPA's advertising disclosure requirements, claiming § 528 violates their First Amendment rights. This section requires a denominated class, termed "debt relief agencies," to include

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[3] Even under the more lenient *Gentile* standard, § 526(a)(4) fails. *Gentile*'s balancing test allows the law to impose "only narrow and necessary limitations on lawyers' speech." 501 U.S. 1030, 1075 (1991); *see also Hersh*, 347 B.R. at 24-25; *Olsen v. Gonzales*, 350 B.R. 906, 916 (D. Or. 2006); *Zelotes v. Martini*, 2006 WL 3231423 *4 (D. Conn. 2006).

[4] Plaintiffs further claim § 526(a)(4) is unconstitutionally vague and overbroad. The United States Supreme Court has expressed a strong preference for as-applied, as opposed to facial, challenges to the constitutionality of federal laws. *Sabri v. United States*, 541 U.S. 600 (2004). The Court finds this law unconstitutional as applied, and declines to expand its inquiry and consider whether it is also vague and overbroad.

particular, or substantially similar, language in their advertisements. Congress has prescribed that such agencies declare: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4), (b)(2).

Here again, the Court must determine the appropriate standard of review. The choice turns on whether the statute regulates deceptive or truthful advertising. Statutes regulating deceptive commercial speech need only withstand rational basis review. *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626, 651-52 (1985). But restrictions on non-deceptive advertising must employ means that directly advance a substantial government interest. *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

The government argues that BAPCPA regulates deceptive advertising, citing evidence adduced before Congress showing "some bankruptcy lawyers did not mention in their advertisements that their ability to make 'debts disappear' derived from the use of the bankruptcy process." (Def.'s Brief 28.) Plaintiffs respond that, when Congress imposed these requirements on all advertisements of bankruptcy assistance, it mandated a blunderbuss which strikes truthful, as well as false or deceptive advertising. The Court agrees.

With very few exceptions, any party advertising debt relief services must include § 528's statutory statement. The present lawyer-plaintiffs advertise themselves as bankruptcy attorneys in newspapers, telephone directories, television, radio, and the internet. There is no evidence, however, suggesting their bankruptcy assistance advertisements are deceptive in any regard. Even as-

suming some debt relief agencies advertise an ability to make "debts disappear," there is no showing such a statement is deceptive. Under these circumstances, the Court finds it appropriate to analyze this question by applying intermediate scrutiny. *See Zauderer*, 471 U.S. at 641.

The government may only regulate truthful bankruptcy assistance advertisements if: (1) the regulation directly advances (2) a substantial government interest, and is (3) "narrowly drawn." *Cent. Hudson*, 447 U.S. at 566; *Zauderer*, 471 U.S. at 641. The Court finds that BAPCPA's § 528 advertising requirements fail to directly advance the government's purported substantial interest and are not narrowly drawn.

The government contends advertising, absent the compulsory statements, may mislead the lay community into thinking debts can be erased without payment or filing for bankruptcy. The government claims §§ 528(a)(4) and (b)(2) protect against consumer deception"by alerting [them] that a lawyer may use bankruptcy as a means to help them." (Def.'s Brief 28.) Setting aside the implausibility of anyone actually believing in a magic wand capable of making debt go away, it is most unlikely that the insertion of the statement "We are a debt relief agency, we help people file for bankruptcy relief under the Bankruptcy Code" prevents consumer deception; it may well increase it.

The term "debt relief agency" is simply a legislative contrivance. The public is more likely to be confused by an advertisement containing this Congressionally-invented term than one which advertises the services of a bankruptcy attorney.

Beyond this, however, the term "debt relief agency" is almost all-encompassing. It instantly swallows all persons who engage in"bankruptcy assistance," attorneys and non-attorneys alike. Congress's merger of both attorneys and non-attorneys is, itself, likely to confuse the public. There are many non-trivial differences between an attorney's services to his or her clients, and services non-lawyers are permitted to offer. Unlike those who only restructure debt, or perhaps provide bankruptcy forms, attorneys give legal advice and actually represent debtors in bankruptcy proceedings. The requirement that parties so dissimilarly-placed must use the same mandated disclosure statement is likely to cause consumer confusion. In this respect, § 528 fails to directly advance the government's stated interest in clarifying bankruptcy service advertisements.[5]

Section 528's advertising requirement is also not narrowly drawn. The narrowly drawn standard is "something short of a least-restrictive means standard." *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989). A narrowly drawn regulation designed to prevent deception "may be no broader than reasonably necessary to prevent the 'perceived evil.'" *In re R.M.J.*, 455 U.S. 191, 203 (1992). Section 528's language not only regulates misleading advertisements—those

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[5] At oral argument, the government's counsel acknowledged areas where the statute is vague. As an example, it appears that the quantum of bankruptcy advice a lawyer offers may require some attorneys to publish the mandated language and others not. The statute makes no distinction between a lawyer who only occasionally has a client facing bankruptcy and those who do so regularly. Quaere: does a 500-person law firm having a single lawyer who regularly does bankruptcy work have to put the disclaimer on every piece of the firm's advertising?

suggesting debts can disappear—it binds all who advertise bankruptcy services. This sweeping regulation goes beyond whatever problem it was designed to address. It broadly regulates absolutely truthful advertisements throughout an entire field of legal practice. The government has failed to show that this restriction on attorneys' commercial speech is justified. As applied to attorneys, this section of BAPCPA fails constitutional scrutiny. Thus, the government cannot prevail on its motion to dismiss.

D. *The "Debt Relief Agency" Definition*

Plaintiffs ask the Court to find attorneys beyond the scope of a BAPCPA "debt relief agency." According to the statute,

> [t]he term 'debt relief agency' means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110.

11 U.S.C. § 101 (12A). This section, of course, makes no direct reference to either "attorney" or "lawyer." It does include the term "bankruptcy petition preparer," which, by definition, expressly excludes attorneys and their staff. *See* 11 U.S.C. § 110(a)(1) (2006). According to plaintiffs, the omission of any reference to attorneys or lawyers, while including a term which excludes attorneys, shows Congress must have intended to exclude attorneys from the "debt relief agency" definition. They also claim it would be absurd for attorneys to provide a statement telling their clients they have a right to an attorney, and that only attorneys can provide legal ad-

vice as required for debt relief agencies under 11 U.S.C. § 527(b).[6]

The government claims the statute includes attorneys because legal representation is included in "bankruptcy assistance," statutorily defined as:

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

11 U.S.C. § 101(4A).

At first glance, this language might include attorneys. But the glance is deceiving: the statute contains a rule of construction for the term "debt relief agency." The statute provides that nothing in §§ 526, 527, and 528 —those sections imposing requirements on debt relief agencies—shall:

> be deemed to limit or curtail the authority or ability . . . of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State.

11 U.S.C. § 526(d)(2)(A).

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[6] At least one court has found these arguments persuasive, holding that debtor attorneys are not "debt relief agencies." *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005).

If lawyers are placed within the ambit of § 101 (4A), the placement conflicts with § 526(d)(2)(A). The conflict would exist because states would be deprived of their ability "to determine and enforce qualifications for the practice of law." If BAPCPA's debt relief agency sections apply to attorneys, it means Congress has taken upon itself the authority to determine the advice attorneys can give their clients and what attorney advertisements must say, thereby infringing on the state's traditional role of regulating attorneys. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States.")

This view is supported by the doctrine of constitutional avoidance. This doctrine counsels that, in construing a statute for ambiguity, the Court must opt for a construction which avoids grave constitutional questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,575 (1988). The Court perceives a clear ambiguity in this statute—on one hand it appears to regulate a lawyer's practice; on the other, such regulation is specifically reserved to the states. As outlined above, these sections would be unconstitutional if applied to attorneys. For these reasons, the Court finds §§ 526, 527 and 528 do not apply to attorneys.

VI. *Conclusion*

The Court finds BAPCPA sections 526(a)(4) and 528(a)(4), (b)(2) are unconstitutional as applied to attorneys. Moreover, the Court finds the debt relief agency provisions of BAPCPA inapplicable to attorneys. There-

fore, the government's motion to dismiss [Docket No. 13] is denied.

IT IS SO ORDERED.

Dated: December 7th, 2006

/s/ JAMES M. ROSENBAUM
JAMES M. ROSENBAUM
United States Chief District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case Number: 05-cv-2626 JMR/FLN

MILAVETZ, GALLOP & MILAVETZ P.A., ROBERT J. MILAVETZ, BARBARA N. NEVIN, JOHN DOE, AND MARY DOE

v.

UNITED STATES OF AMERICA

[Apr. 19, 2007]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' motion for summary judgment [Docket No. 37] is granted.
2. BAPCPA's Title 11 U.S.C. Sections 526(a)(4) and 528(a)(4) and (b)(2) are declared unconstitutional,

as applied to attorneys in the District of Minnesota.

3. The Court finds that attorneys in the District of Minnesota are excluded from the term "debt relief agency," as defined in 11 U.S.C. § 101(12A); as such, Minnesota attorneys are relieved of any duties relating to BAPCPA-defined debt relief agencies imposed by that statute.

April 19, 2007 — RICHARD D. SLETTEN, CLERK
Date

BY:
/s/ KATIE THOMPSON
KATIE THOMPSON, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2405

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.,
APPELLEES

v.

UNITED STATES, APPELLANT

COMMERCIAL LAW LEAGUE OF AMERICA,
AMICUS ON BEHALF OF APPELLEE

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA—MINNEAPOLIS
(0:05-cv-02626-JMR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Riley, Judge Colloton, Judge Gruender, Judge Benton and Judge Shepherd would grant the petition for rehearing en banc.

December 05, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

1. 11 U.S.C. 101 provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

* * * * *

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bank-

ruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

* * * * *

2. 11 U.S.C. 526 provides:

Restrictions on debt relief agencies

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted

person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this

section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys'fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

OPPOSITION BRIEF

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Supreme Court, U.S.
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No. 08-1225

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 526(a)(4) is amenable to an interpretation that would not act as a prior restraint to Petitioners' rights to receive information and to give truthful legal advice to bankruptcy clients.

2. Whether Section 526(a)(4) can be subjected to an objective interpretation if the doctrine of constitutional avoidance if applied to avoid First Amendment violations of freedom of speech.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents, who were appellees in the court of appeals, are Milavetz, Gallop & Milavetz, P.A.; Robert J. Milavetz; Barbara N. Nevin; Ronald Richardson (captioned as John Doe); and Lynette Richarson (caption as Mary Doe).

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STATEMENT OF THE CASE

I. Declaratory Judgment Complaint

The Petitioners brought this civil action based upon respondent's overbreadth of subjectivity in whether attorneys are "debt relief agencies," (hereinafter DRAs) and if so if the provisions of Section 526(a)(4) and Section 528(a)(2), (b)(4) are unconstitutional as limiting freedom of speech. The district court concluded that attorneys are not DRAs and that the challenged sections were unconstitutional as applied to attorneys. Pet. App. 74a-88a. The Petitioners petition this Court for review because the court of appeals' ruling is inconsistent with decisions of other courts, wrongly decides an important issue, and, if left uncorrected, will impede, rather than advance, the freedom of speech and due process rights of Petitioners in this extraordinarily important case.

1. Petitioners brought this action in the United States District Court for Minnesota, seeking a declaratory judgment that two provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") (a) do not apply to attorneys and law firms and (b) are unconstitutional. The first provision at issue provides that a DRA (defined by 11 U.S.C. § 101(12A)) shall not advise a person who is being assisted in bankruptcy to incur more debt in contemplation of filing for bankruptcy. 11 U.S.C. § 526(a)(4). The second provides that a DRA shall clearly and conspicuously state in its advertising, "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4), (b)(2)(B).

Petitioners argue that the definition of a DRA in 11 U.S.C. § 101(12A) excludes attorneys. Petitioners also argue, in the alternative, that 11 U.S.C. § 526(a)(4) and 11 U.S.C. § 528(a)(4), (b)(2)(B), to the extent they apply to attorneys, violate freedom of speech as guaranteed by the First Amendment and Due Process by the Fifth Amendment of the United States Constitution.

II. Proceedings Below

The District Court on December 7, 2006 denied the government's request to dismiss the action. P.A. 29A. The District Court on April 19, 2007 then granted Petitioners' motion for summary judgment for the Petitioners, and issued a declaratory judgment that (a) attorneys do not fall within the definition of "debt relief agency" and (b) the challenged provisions, as applied to attorneys, violate the First Amendment.

The United States on August 21, 2007 appealed the District Court's order to the Eighth Circuit Court of Appeals. P.A. . The Petitioners submitted their brief in opposition on September 24, 2007. The Eighth Circuit Court of Appeals heard oral arguments on March 11, 2008 and issued their opinion on September 4, 2008. The Court of Appeals then issued a corrected order on September 23, 2008. On the merits, the Eighth Circuit majority ruled that giving the provisions of the BAPCPA a plain reading, attorneys who provide bankruptcy assistance to assisted persons are unambiguously included in the definition of DRAs.

The Court further held regardless of whether the government's interest in prohibiting certain kinds of speech under the Act was legitimate or compelling, Section 526(a)(4) preventing DRAs from advising debtors to incur debt was unconstitutionally overbroad as applied to attorneys because it is not narrowly tailored, nor narrowly and necessarily limited to restrict only that speech that the government has an interest in restricting; this prohibition would included advice constituting prudent bankruptcy planning that is not an attempt to circumvent, abuse or undermine bankruptcy laws and, as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited by the Bankruptcy Code or other applicable law.

The Court also ruled that advertising disclosure requirements mandated by Sections 528(a)(4) and (b)(2)(B) of the Act which require DRAs to disclose that they are DRAs which help people file for bankruptcy relief under the Code are not unconstitutional as they only require attorneys to disclose factually correct statements in their advertising; although less intrusive means may be conceivable to prevent deceptive advertising, the sections' disclosure requirements are reasonably related to the government's interest in protecting consumer debtors from deceptive advertising.

SUMMARY OF THE ARGUMENT

Issuance of a writ of *certiorari* as to Questions One and Two of Petitioner's should be denied. The Eighth Circuit gave due regard to a narrowing construction and found none available. No conflict exists that Section 526(a)(4) is written in a manner that needs revision or is unconstitutional. Congress's efforts to craft a federal remedy for the provision of abusive bankruptcy advice would still exist without Section 526(a)(4).

REASONS FOR DENYING THE PETITION

I. THE CIRCUITS ARE NOT IN CONFLICT OVER THE REVISION OF SECTION 526(a)(4).

The government relies heavily on a conflict between the decision by the Eighth Circuit and the decision in *Hersch v. United States ex rel. Mukasey*, 552 F.3d 743 (2008), petition for cert. Pending, No. 08-1174 (filed Mach 18, 2009). The conflict is unfounded. Both courts found that the provision as written was unconstitutional. The remedy the courts used to correct the unconstitutional provision were different in that the Eighth Circuit declared Section 526(a)(4) unconstitutional on its face as overbroad and no constitutional interpretation could exist as it would only create a subjective dilemma. The *Hersch* court held that constitutional avoidance could be used to read the statute as only applying to abusive debts.

The question of whether facially the Section 526(a)(4) as written is unconstitutional, is not in dispute and the circuits are not in conflict that Section 526(a)(4)

is unconstitutional on its face. The dissent of Judge Colloton in the Eighth Circuit indicates that the statute suffers from overbreadth, but indicates constitutional avoidance can remedy the overbreadth in Section 526(a)(4).

II. THE COURT OF APPEALS DID NOT ERROR IN HOLDING SECTION 526(a)(4) UNCONSTITUTIONAL.

Section 526(a)(4) cannot survive strict scrutiny. The government argues that the statute should be narrowly interpreted as merely prohibiting an attorney from advising a client to take on more debt in contemplation of bankruptcy when the intent is to manipulate the bankruptcy system and take unfair advantage of bankruptcy debt discharge. The statutory language, however, does not support this narrow interpretation. The statute will have a chilling effect on attorneys, effectively prohibiting attorneys from advising clients to incur *any* debt—even under circumstances not prohibited by the bankruptcy laws—for any purpose in contemplation of bankruptcy.

There are several types of debt obligations, such as home mortgages, home equity loans, or auto loans, as to which it is entirely legitimate and prudent for an attorney to advise a client to incur "more debt" as part of routine pre-bankruptcy planning. These debts are not taken on to manipulate the bankruptcy system and will usually survive bankruptcy through the reaffirmation process. Instead the debts are incurred in contemplation of bankruptcy because of the adverse financial consequences that the bankruptcy will have on

the debtor. The government does not have a compelling interest in preventing a debtor from incurring these types of debts prior to filing for bankruptcy, particularly since nothing in the bankruptcy laws prevent the consumer from incurring such debt in contemplation of bankruptcy.

Section 526(a)(4) is not narrowly tailored because Congress has numerous less drastic alternatives to prevent abuses and manipulation of the federal bankruptcy system. Under BAPCPA, debt relief agencies are prohibited from advising the people they are assisting to make untrue or misleading statements in bankruptcy filings. Attorneys who assist in bankruptcies are required, by Fed. R. Bankr. P. 9011, which applies the Rule 11 standard to bankruptcy proceedings, to sign bankruptcy documents as a certification that they have performed a reasonable investigation into the circumstances and that the documents do not constitute an abuse of the bankruptcy system. Section 707(b) of the new bankruptcy code is written to prohibit violations of abusive debts, regardless of whether Section 526(a)(4) exists. Attorneys are also governed by state rules of professional responsibility, which prohibit attorneys from advising clients to undermine the law, at the risk of discipline, including license revocation. Moreover, bankruptcy courts and creditors are gatekeepers of bankruptcy filings and have a number of existing procedures available to determine whether a debtor has acted in bad faith or with intent to abuse the bankruptcy system.

Finally, Congress could have addressed this perceived abuse by a less restrictive alternative:

amending the bankruptcy code to tighten the restrictions on debt incurred in contemplation of bankruptcy by, for example, making such debt more difficult to discharge. Congress did not choose this route, however, but instead chose to prohibit attorneys from informing clients as to routine bankruptcy planning options that are perfectly legal and ethical. In doing so, Congress infringed on the free speech rights of attorneys and on the traditional role of the States in regulating the legal profession.

The government argues that § 526(a)(4) should be interpreted as merely preventing an attorney from giving advice that a client take on more debt in contemplation of bankruptcy when the intent is to manipulate the bankruptcy system, engage in abusive conduct, and take unfair advantage of bankruptcy debt discharge. However, the plain language of the statute does not permit this narrow interpretation—it prohibits advising a client to incur *any* debt for *any* purpose when the client will be filing or is contemplating[1] filing for

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[1] The term "contemplating" as used in BAPCPA is itself vague. The statute does not specify a time frame for when a debt relief agency is prohibited from advising a person who is contemplating bankruptcy to take on more debt. For example, a particular debtor may be considering filing for bankruptcy weeks, months, or even years, in the future and may be attempting to organize his financial situation so as to avoid having to file for bankruptcy. Section 526(a)(4) prevents a debt relief agency from advising this debtor to take on more debt during this entire span of time, and even if the additional debt would prevent the debtor from even having to file for bankruptcy. This vagueness of the term "contemplating" creates an even larger prior restraint on free speech.

bankruptcy, even if that debt would not be discharged during a bankruptcy proceeding. The statute thus permits an attorney to be sanctioned for fulfilling his duty to his client to give legal and appropriate advice not otherwise prohibited by the Bankruptcy Code. In fact, it has long been recognized that lawyers are required to give clients competent legal advice, even at the expense of the government. *See* Model Rules of Prof'l Conduct R. 1.1 (2007); Minn. Rules of Prof'l Conduct R. 1.1 (2007). Courts in other jurisdictions have construed the provision in this way. *See Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006). This Court has traditionally interpreted the use of the word "any," which prefaces the business or transaction clause, undercuts the ability to apply constitutional avoidance. *See United States v. James*, 478 U.S. 597, 604-605, and n.5, 106 S.Ct. 3116, 3120-3121, and n.5, 92 L.Ed.2d 483 (1986); *Trainmen v. Baltimore & Ohio R. Co.*, 331, U.S. 519, 529, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947)

In general laws must follow the plain and unambiguous meaning of the statutory language. "[O]nly the most extraordinary showing of contrary intentions; in the legislative history will justify departure from that language." *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed. 536 (1985). (citations omitted) (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482-483, 83 L.Ed.2d 472 (1984); *see also Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 519-520, 116 L.Ed.2d 496 (1991) (courts may deviate from the plain language of a statue on in "rare and exceptional circumstances").

While statutes should be construed to avoid constitutional conflict, the principle of constitutional avoidance is not a license for the judiciary to rewrite language enacted by the legislature. *See Heckler v. Matthews*, 465 U.S. 728, 741-742, 104 S. Ct. 1387, 1396-1397, 79 L.Ed.2d 646 (1984). The government is requesting this Court to press a statutory construction to the point of disingenuous evasion even to avoid a constitutional question. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

In *NAACP v. Button*, 371 U.S. 415 (1963), the United States Supreme Court held:

> The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, * * * that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.

Id. at 438-439, citations omitted.

Many debt obligations assumed prior to filing for bankruptcy are wholly appropriate from a financial and legal prospective. These obligations are not necessarily taken on for fraudulent reasons. BAPCPA restricts

attorneys from advising clients on various strategies of routine and prudent pre-bankruptcy planning that may be in their clients' best interests , that may enable a bankruptcy petitioner to avoid bankruptcy, and that are not an attempt to circumvent or undermine federal bankruptcy laws. For example, BAPCPA prevents attorneys from recommending that their clients obtain or refinance a home mortgage, apply for a home equity line of credit, or take on an auto loan for a vehicle that is needed to get to work, prior to filing for bankruptcy. These steps are often prudent because the debtor's credit rating, the interest rate on the loan, or the down payment or monthly payments will be adversely affected by bankruptcy. Such debts are generally not fraudulent because they are of a secured nature and will usually survive the bankruptcy.[2] Section 526(a)(4) also prevents

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[2] *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (Summer 2005).

> This [§ 526(a)(4)] prohibition is particularly troubling when it might be completely legal and even desirable for the client to incur such debt. For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case. For example, the client may intend to keep all payments fully current and to reaffirm such debt once the case is filed.
>
> Moreover, most of an attorney's fee for handling a Chapter 13 case is paid over time through the Chapter 13 plan. But that means that at the time the case is filed, the client has incurred
>
> (Cont'd)

attorneys from advising their clients that they may co-sign on a child's student loan or pay for credit counseling prior to filing for bankruptcy (which is required as part of beginning a bankruptcy proceeding). Prohibiting such advice thus runs counter to the overall purpose of bankruptcy laws (1) to assist the debtor, as well as the creditor, by not having debts go through bankruptcy, and (2) to have debtors learn sound financial planning.

These types of debts are incurred "in contemplation of bankruptcy" under the language of § 526(a)(4) in that the debt obligation is strategically taken on prior to bankruptcy because of the adverse financial consequences that the bankruptcy will have on the debtor. *See Tripp v. Mitschrich*, 211 F. 424, 427 (8th Cir. 1914) (stating that the phrase "in contemplation of bankruptcy" means that, "in making the transfer the debtor is influenced by the possibility or imminence of such proceeding. There must be some relation of cause and effect between knowledge of his condition and the transfer.").

(Cont'd)

additional debt in contemplation of filing a bankruptcy case. Indeed, such debt was specifically incurred for the purpose of paying the fees of the attorney filing the case.

But 526(a)(4) appears to prohibit any attorney from advising a client to incur any such debt, regardless of how appropriate or advisable. The clause directly regulates the content of speech of lawyers to their clients, even when it is accurate, legal, and desirable. In addition to First Amendment considerations on this issue, there are strong public policy considerations implicated when the government restricts the type of advice attorneys can give their clients.

Appropriate pre-bankruptcy planning is an important aspect of an attorney's professional responsibility when knowledgeably, skillfully, and thoroughly representing a client who is contemplating filing for bankruptcy. *See* Model Rules of Prof'l Conduct R. 1.1 (2007) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *accord* Minn. Rules of Prof'l Conduct R. 1.1 (2007). The § 526(a)(4) restriction on attorney free speech prohibits attorneys from fulfilling a critical aspect of their ethical obligation to provide competent pre-bankruptcy planning. The government can provide no compelling interest in preventing such planning when it is not intended to be fraudulent.

Congress also has numerous less drastic alternatives to prevent abuses of the bankruptcy system. Debt relief agencies are prohibited from advising the people they are assisting to make untrue or misleading statements in bankruptcy filings. 11 U.S.C. § 526(a)(2). Attorneys who prepare bankruptcy petitions, pleadings, and motions are required to sign such documents as a certification that they have performed a reasonable investigation into the circumstances giving rise to the documents and that the documents are well grounded in fact and do not constitute an abuse of the bankruptcy system. 11 U.S.C. § 707(b)(4)(C). *See also* Fed. R. Civ. P. 11(b) (stating that, in presenting a pleading to a court, an attorney is certifying that the document is not being presented for any improper purpose); *accord* Fed. R. Bankr. P. 9011(b) (application of Rule 11 standards to bankruptcy filings).

Attorneys are also regulated by state rules of professional responsibility, which prohibit them from advising clients to undermine the law. *See e.g.*, Model Rules of Prof'l Conduct R. 1.2(d) (2007) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."); *accord* Minn. Rules of Prof'l Conduct R. 1.2(d) (2007).

Moreover, bankruptcy courts are able to closely examine bankruptcy filings to determine whether a debtor has acted with bad faith or with intent to abuse the bankruptcy system. *See* 11 U.S.C. § 707(b)(1), (b)(3); *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105, 1110-11 (2007); *In re Walton*, 866 F.2d 981 (8th Cir. 1989). BAPCPA amended the previous bankruptcy laws to make it easier for a court to dismiss a bankruptcy petition by reducing the threshold finding from "substantial abuse" to mere "abuse," and even created a presumption of abuse if certain qualifications are met. *See* 11 U.S.C. § 707(b); H.R. Rep. No. 109-31, pt. 1, at 48-49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 119-20. Bankruptcy courts also have the authority to punish violations of federal bankruptcy laws. *See* 11 U.S.C. § 526(c)(5).

III. THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW.

"Writs of certiorari are matters of grace" (*Wade v. Mayo*, 1948, p. 680). Supreme Court Rule 10 sets out factors that, while "neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers." These are that

(1) the decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law; (2) the court below decided an important federal question in a way that conflicts with rulings of the Supreme Court; (3) the court below decided a question of federal law that is so important that the Supreme Court should pass upon it even absent a conflict; or (4) (a category into which very few grants fall) the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

The government has, at best, presented that a conflict exists between two circuit courts of appeal, which respondent disagrees. The government has not shown however that uniformity is necessary and that the conflict is going to be difficult to live with. *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990); The issue of conflicting circuit opinions regarding a bankruptcy interpretation is not uncommon and the conflict is acceptable and not sufficient to warrant review. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747 (C.A. 1999); *In re Sunterra Corp.*, 361 F.3d 257 (C.A.4 2004); *In re James Caple Partners, L. P.*, 27 F.3d 534 (C.A. 11 1994) (*per curiam*); *In re West Electronics, Inc.*, 852 F.2d 79 (C.A. 3 1988); *N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc., et al.*, 2008 WL 4522334 (U.S.), 77 USLW 3242 (U.S. 2008).

CONCLUSION

The government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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No. 08-1225

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

No. 08-1225

UNITED STATES OF AMERICA, PETITIONER

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The court of appeals has invalidated an important federal statute based on a mistaken reading of its text and a consequently mistaken conclusion that it is fatally overbroad. Congress enacted 11 U.S.C. 526(a)(4) to address the documented problem of attorneys' advising clients to take on more debt on the eve of bankruptcy with the intent to abuse the bankruptcy system. Correctly read, Section 526(a)(4) prohibits only that abusive advice, and as so construed it is clearly constitutional. The Fifth Circuit has reached that conclusion and, in so doing, has disagreed with the decision below. This Court should resolve the circuit conflict and remove the obstacle to nationwide enforcement of Section 526(a)(4) created by the decision below.

A. The Circuit Split On The Statutory And Constitutional Questions Presented Warrants This Court's Review

The court of appeals in this case struck down Section 526(a)(4) as "unconstitutional as applied to attorneys," Pet. App. 15a, which respondents characterize as holding the statute "unconstitutional on its face," Br. in Opp. 4. By contrast, the Fifth Circuit has upheld Section 526(a)(4) against a substantially identical First Amendment challenge. *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 764 (5th Cir. 2008) ("[W]e hold that the district court erred in holding section 526(a)(4) unconstitutional on its face and we reverse the judgment of the district court on this issue."), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009). Respondents contend (Br. in Opp. 4-5) that those holdings are nonetheless consistent because the Fifth Circuit "found that [Section 526(a)(4)] as written was unconstitutional." That argument lacks merit.

1. To resolve the constitutional question before it, the Fifth Circuit in *Hersh* initially construed Section 526(a)(4). 553 F.3d at 755-761, 763. That approach is consistent with this Court's recognition that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). The Fifth Circuit concluded that Section 526(a)(4) "can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system." *Hersh*, 553 F.3d at 761. The court then held that the statute, so construed, is constitutional. *Id.* at 762-764.

To be sure, the court in *Hersh* used all relevant tools of statutory interpretation, including the canon of constitu-

tional avoidance, in construing Section 526(a)(4). See, *e.g.*, 553 F.3d at 758-759 (accepted meaning of "'in contemplation of' bankruptcy"); *id.* at 759-761 (statutory structure); *id.* at 760 (legislative history). But, as this Court often has noted, construing a statute to avoid a substantial constitutional question is not the same thing as actually answering that question. Rather, "the canon of constitutional avoidance 'is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.'" *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (quoting *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005)).

The Fifth Circuit in *Hersh* construed Section 526(a)(4) in a way that removes any significant doubt as to its constitutionality. The court then confirmed that, so construed, the statute is constitutional. The court did not hold that Section 526(a)(4) is unconstitutional and then impose a "remedy" (Br. in Opp. 4-5) such as the severance of an invalid portion of the statute; it upheld the statute in full. Respondents' contrary argument "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation." *Clark*, 543 U.S. at 381.

2. Even if respondents' characterization of the Fifth Circuit's *reasoning* were correct, the actual *holding* of *Hersh* is irreconcilable with the holding in this case. The court in this case struck down Section 526(a)(4) on grounds of overbreadth "as applied to attorneys." Pet. App. 15a. The consequence of that holding is that, in the Eighth Circuit, Section 526(a)(4) cannot be applied even to attorney conduct that concededly can be regulated consistent with the First Amendment, such as advice to abuse the bankruptcy system. In the Fifth Circuit, by contrast, attorneys

who engage in that sort of abusive conduct are subject to the remedies set out in Section 526(c)(2)(A), (3) and (5).

Thus, attorneys are regulated in materially different ways in the Fifth and Eighth Circuits as a result of the court of appeals' erroneous statutory construction, see Pet. 16-20, and its erroneous constitutional analysis, see Pet. 20-22. That conflict alone provides a sufficient reason for this Court's review.

B. The Court Of Appeals' Invalidation Of An Important Act Of Congress Warrants This Court's Review

Respondents further contend that, even when the courts of appeals are in conflict, this Court often denies review of questions "regarding a bankruptcy interpretation." Br. in Opp. 14. But this is no run-of-the-mine bankruptcy case, because here the court of appeals invalidated an Act of Congress on First Amendment grounds. A declaration that a federal statute is unconstitutional, as applied to a substantial category of regulated persons, presents "an important question of federal law" that should be settled by this Court. Sup. Ct. R. 10(c); see, *e.g.*, *Williams*, *supra*; *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari."); *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) (same); Pet. 22.

Furthermore, Section 526(a)(4) is an important part of the federal framework that protects the nationwide bankruptcy system against abuse. Respondents acknowledge the extensive reforms that Congress adopted in 2005 to reduce and remedy those abuses. See Br. in Opp. 6, 13; see also Pet. 3-4, 23-27. Section 526(a)(4) plays a key role in those reforms. Several provisions of the Bankruptcy Code penalize debtors who engage in abusive filings, and Section 526(a)(4) allows those debtors to seek compensation from

their attorneys when the abusive conduct is attributable to the attorneys' unethical advice. See 11 U.S.C. 526(c)(2)(A).

Respondents suggest that Section 526(a)(4)'s invalidation will not be of great consequence because state rules of professional conduct provide overlapping protection in this area.[1] Although the substance of Section 526(a)(4) indeed overlaps with longstanding state-law restrictions on unethical attorney advice, that fact simply underscores that Section 526(a)(4), properly construed, does not violate the First Amendment. See p. 8, *infra*. Moreover, as compared with state law, the Bankruptcy Code provides both a uniform nationwide rule and a set of additional remedies.

First, the Code creates a private right of action by a client against an unethical attorney who has violated Section 526(a)(4), and it encourages such actions in the public interest by providing for fee-shifting. 11 U.S.C. 526(c)(2). Second, the Code permits prospective injunctive relief, 11 U.S.C. 526(c)(3)(A) and (5)(A), whereas an unethical practitioner who has been sanctioned under the law of one jurisdiction may continue to provide unethical advice in another. Each of these elements is particularly significant in light of the multijurisdictional, even nationwide nature of much

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[1] Respondents also suggest (Br. in Opp. 7), for the first time in this litigation, that Section 526(a)(4) is an infringement of States' authority to regulate attorneys. That contention is without merit. The federal government has long regulated the conduct of attorneys as it bears on federal interests. See, *e.g.*, *Sperry* v. *Florida*, 373 U.S. 379, 387-400 (1963); 15 U.S.C. 7245 (providing for the Securities and Exchange Commission to issue "minimum standards of professional conduct for attorneys appearing and practicing before the Commission"); 31 C.F.R. 10.20 *et seq.* (rules for practice before the Internal Revenue Service); 37 C.F.R. 10.20 *et seq.* (Patent and Trademark Office Code of Professional Responsibility). Bankruptcy is a subject of particular federal concern. See U.S. Const. Art. I, § 8, Cl. 4.

modern bankruptcy practice.[2] Indeed, a practitioner in a particular bankruptcy court may not even be licensed by the bar of the State in which the court is located. See, *e.g.*, *Rittenhouse* v. *Delta Home Improvement, Inc. (In re Desilets)*, 291 F.3d 925, 930-931 (6th Cir. 2002).

C. The Court Of Appeals' Decision Is Erroneous

Respondents' defense of the Eighth Circuit's holding on the merits of the constitutional issue depends entirely on accepting that court's interpretation of the statute. See, *e.g.*, Br. in Opp. 5-6 (asserting that Section 526(a)(4) "effectively prohibit[s] attorneys from advising clients to incur *any* debt"); accord *id.* at 7-8, 9-11, 12. The first question presented seeks review of that statutory interpretation, with which the Fifth Circuit squarely disagreed. Respondents offer no persuasive defense of the court of appeals' statutory holding.

1. As explained in the petition (at 16), the court of appeals erred in concluding that the "plain language" of Section 526(a)(4) requires an interpretation that would render the statute unconstitutionally overbroad. The court of appeals did not identify any aspect of the statutory text supporting that assertion. See Pet. App. 12a. Respondents invoke the court of appeals' reference to the "plain language" of Section 526(a)(4), Br. in Opp. 7, 8; see *id.* at 5, 9, but they similarly do not explain how the unambiguous

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[2] See, *e.g.*, Daniel Pouladian & Leslie Reed, Comment, *"You Are Now Free to Move About the Country": Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice*, 52 UCLA L. Rev. 937, 966 (2005) (discussing "[t]he hybrid nature of bankruptcy practice and the unique way in which the location of debtors, creditors and the property at issue can be in so many locations").

meaning of any term in the statute compels their reading.[3] Nor do they dispute the analysis of the statutory structure, context, and legislative history set forth in the government's certiorari petition and in the dissenting opinion below. See p. 3, *supra*; Pet. 17-18; Pet. App. 25a, 26a-28a (Colloton, J., concurring in part and dissenting in part).

Indeed, petitioners concede that the crucial term "in contemplation of [bankruptcy]" is ambiguous. See Br. in Opp. 7 n.1 ("The term 'contemplating' [*sic*] as used in BAPCPA is itself vague."). Because that ambiguity plainly *permits* the adoption of the government's proposed narrowing construction, the court of appeals erred by interpreting the statute in a way that raised rather than avoided constitutional concerns. That is particularly so in light of the ample history and precedent supporting the government's construction of the term as requiring an abusive purpose. See Pet. 16-17; Pet. App. 25a-26a (Colloton, J., concurring in part and dissenting in part); *Hersh*, 553 F.3d at 758-760.[4]

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[3] Respondents appear to contend (Br. in Opp. 8) that the use of the term "any" is sufficiently unambiguous to preclude reliance on the doctrine of constitutional avoidance. But the word "any" does not appear in Section 526(a)(4), and respondents' argument would lack merit even if the statute did contain that word. See *Boos* v. *Barry*, 485 U.S. 312, 329 (1988).

[4] Respondents' reliance (Br. in Opp. 11) on *Tripp* v. *Mitschrich*, 211 F. 424 (8th Cir. 1914), is misplaced. The court in *Tripp* held that, under Section 60d of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 562, a transaction is undertaken "in contemplation of [bankruptcy]" only if the transaction is "induced at least to some extent by" the prospect of a bankruptcy proceeding. 211 F. at 427. But the court had no occasion to identify the precise connection that the statute required, because it did not find "anything [in the record] which shows that [the] contract [at issue] * * * was prompted by impending bankruptcy." *Id.* at 429. In addition, *Tripp* involved a federal statute different from the one at issue here, and the case did not implicate the doctrine of constitutional avoidance.

2. Properly construed, Section 526(a)(4) is not unconstitutionally overbroad. The court of appeals' finding of *substantial* overbreadth was unsupported even under the court's construction, see Pet. 20-22; that finding plainly cannot stand if the statute covers only advice to incur debt to abuse the bankruptcy system. Indeed, the Eighth Circuit did not suggest that Section 526(a)(4) would be subject to any plausible constitutional objection if the government's narrowing construction were adopted.

Respondents likewise do not dispute that the government's interpretation would save the statute from any claim of overbreadth. Indeed, they appear to recognize that Rule 1.2(d) of the Model Rules of Professional Conduct is constitutional. Br. in Opp. 13. And, as the Fifth Circuit explained, Rule 1.2(d) overlaps with Section 526(a)(4) and furthers complementary ends. *Hersh*, 553 F.3d at 756; see Pet. 21. Thus, if this Court agrees with the Fifth Circuit's construction of Section 526(a)(4), its ruling on the interpretive question effectively will resolve the existing circuit conflict with respect to the statute's constitutionality.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

MAY 2009

JOINT APPENDIX

005-4214 (7) (4)

Nos. 08-1119, 08-1225

Supreme Court, U.S.
FILED
AUG 24 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED March 5, 2009 & April 3, 2009
CERTIORARI GRANTED June 8, 2009

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The following opinions and orders have been omitted in printing this Joint Appendix because they appear in the appendix of the Petition for a Writ of Certiorari filed by the Petitioners / Respondents on the following pages:

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General Docket
Eighth Circuit Court of Appeals
Court of Appeals Docket #: 07-2405

06/19/2007	Civil case docketed. (CBC)
06/19/2007	Originating court document filed consisting of notice of appeal, link to district court docket entries, 4/19/07 judgment in a civil case, 4/19/07 order. (CBC)
06/19/2007	BRIEFING SCHEDULE SET AS FOLLOWS: Transcript due on or before 07/30/2007. Appendix due 08/08/2007. Brief appellant, United States, due 08/08/2007. Appellee brief is due 30 days following service of appellant's brief. Appellant reply brief is due 14 days following service of appellee brief. (CBC)
06/22/2007	APPEARANCE FILED by Attorney Mr. Chad Schulze for Appellees Mary Doe, John Doe, Milavetz, Gallop & Milavetz, P.A., Mr. Robert J. Milavetz and Ms. Barbara N. Nevin w/service 06/22/2007 (CS)
06/22/2007	APPEARANCE FILED by Attorney Mr. Alan Scott Milavetz for Appellees Mary Doe, John Doe, Milavetz,

Gallop & Milavetz, P.A., Mr. Robert J. Milavetz and Ms. Barbara N. Nevin w/service 06/22/2007 (CS)

06/22/2007 APPEARANCE FILED by Attorney Mr. Joseph A. Rymanowski, Jr. for Appellees Ms. Barbara N. Nevin, Milavetz, Gallop & Milavetz, P.A. and Mr. Robert J. Milavetz w/service 06/22/2007 (CS)

06/22/2007 APPELLEE'S FORM B RECEIVED from Appellees Mr. Robert J. Milavetz, Milavetz, Gallop & Milavetz, P.A. and Ms. Barbara N. Nevin (CS)

06/22/2007 CORPORATE disclosure statement filed by Appellee Milavetz, Gallop & Milavetz, P.A. - FOR CAL. (CS)

06/22/2007 CORRECTED certificate of service for disclosure, disclosure for Calendar, settlement form, Appearance, Appearance, Appearance, filed by Appellees Mr. Robert J. Milavetz, Milavetz, Gallop & Milavetz, P.A. and Ms. Barbara N. Nevin (CS)

06/25/2007 APPEARANCE FILED by Attorney Mr. Mark R. Freeman for Appellant United States w/service 06/25/2007. Attorney contacted and asked to file

corrected certificate of service with respect to attorney Joseph Rymanowski. (MRF)

06/25/2007 APPEARANCE FILED by Attorney Mr. Mark B. Stern for Appellant United States w/service 06/25/2007 Attorney contacted and asked to file corrected certificate of service with respect to attorney Joseph Rymanowski. (MRF)

06/25/2007 CORRECTED certificate of service for Appearance, Appearance, filed by Appellant United States (MRF)

06/26/2007 APPELLANT'S FORM A FILED from Appellant United States (MRF)

06/28/2007 Certificate of transcript filed by Appellant United States. No Transcript *All necessary transcripts already prepared.* (MRF)

06/28/2007 METHOD of appendix preparation filed by Appellant United States - Joint Appendix (MRF)

07/03/2007 RECORD FILED - Record Part: MOTION TRANSCRIPT, No. of Volumes: 1, Volumes Location: STP

Clerk's Office, Comments: Doc. #53, Source Location: Dist. Ct., Dt. of Proceeding/Hearing: 04/04/2006, No. of Pgs.: 43, Court Reporter: Hansen, Dawn (CBC)

07/31/2007 MOTION of Appellant United States for extension of time to file brief until 08/21/2007. w/service 07/31/2007. Document attached: motion for 13-day extension.pdf. (MRF)

08/01/2007 CLERK ORDER: Granting motion for extension of time to file brief filed by Appellant United States. Appendix due on 08/21/2007. Appellant/petitioner brief of United States due 08/21/2007. (LAB)

08/22/2007 RECORD FILED - Record Part: JOINT APPENDIX, No. of Volumes: 1, Volumes Location: STL, Comments: 3 Copies (YML)

08/22/2007 BRIEF FILED - APPELLANT BRIEF filed by United States, w/service 08/21/2007. 63 PDF pages w/Addendum, 10 copies, Words/lines/pages:10,967 words. Brief of United States due 9/20/07 (YML)

09/18/2007	APPEARANCE FILED by Attorney Mr. Thomas Frank Miller for Appellees Mary Doe and John Doe w/service 09/18/2007 (CS)
09/20/2007	RESPONSE in opposition to brief Appellant/Petitioner Brief, filed by Appellees John Doe, Mary Doe, Mr. Robert J. Milavetz and Milavetz, Gallop & Milavetz, P.A., w/service 09/20/2007. DOCUMENT SEALED, INCORRECT EVENT USED AND BRIEFS ARE NOT FILED ELECTRONICALLY. COUNSEL REQUESTED TO SUBMIT BRIEFS IN PAPER FORM. Modified by YML (CS)
09/20/2007	CORRECTED certificate of service for response, filed by Appellees John Doe, Mary Doe, Mr. Robert J. Milavetz, Milavetz, Gallop & Milavetz, P.A. and Ms. Barbara N. Nevin (CS)
09/21/2007	BRIEF FILED - APPELLEE BRIEF filed by John Doe, Mary Doe, Mr. Robert J. Milavetz, Milavetz, Gallop & Milavetz, P.A. and Ms. Barbara N. Nevin, w/service 09/20/2007 59 PDF pages No Addendum, 10 copies, Words/lines/pages: 12,571

words. Reply brief of United States due on 10/04/2007. (YML)

09/27/2007 BRIEF FILED - AMICUS BRIEF filed by Commercial Law League of America w/service 09/26/2007 19 PDF pages No Addendum, 10 copies, Words/lines/pages: 15 pgs. (YML)

10/01/2007 MOTION for extension of time to file brief until 10/11/2007, filed by Appellant United States w/service 10/01/2007. (MRF)

10/02/2007 CLERK ORDER:Granting motion for extension of time to file brief filed by Appellant United States. Reply brief of United States due 10/11/2007 (YML)

10/12/2007 BRIEF FILED - APPELLANT REPLY BRIEF filed by United States, w/service 10/11/2007. 30 PDF pages No Addendum, 10 copies, Words/lines/pages: 5,242 words. (YML)

10/29/2007 Tendered amicus brief. Received from Interested Party National Association of Consumer Bankruptcy Attorneys. w/service 10/23/2007

(YML)

10/29/2007 MOTION to file brief out of time, filed by Interested Party National Association of Consumer Bankruptcy Attorneys w/service 10/23/2007. (YML)

10/31/2007 Motion of interested party, National Association of Consumer Bankruptcy Attorneys, for leave to file amicus curiae brief on behalf of National Association of Consumer Bankruptcy Attorneys. (PJR)

10/31/2007 RESPONSE in opposition to motion file brief out of time, motion leave to file amicus brief, filed by Appellant United States, w/service 10/31/2007. (MRF)

10/31/2007 RESPONSE in opposition to motion file brief out of time, response, motion leave to file amicus brief, document, filed by Appellees Mr. Robert J. Milavetz, Milavetz, Gallop & Milavetz, P.A. and Ms. Barbara N. Nevin, w/service 10/31/2007. (CS)

11/08/2007 JUDGE ORDER: The motions of the National Association of Consumer Bankruptcy Attorneys for leave to

participate as amicus and for leave to file an amicus brief out of time have been considered by the court and are denied. Adp Nov 2007 (YML)

02/08/2008 SET FOR ARGUMENT - CASE PLACED ON CALENDAR - for Argument in University of St. Thomas on 03/11/2008. To be heard before Judges Kermit E. Bye, Lavenski R. Smith, Steven M. Colloton in Division I. All attorneys presenting oral argument must complete a Response Form. The Response Form may be found at http://www.ca8.uscourts.gov/newcoa/forms/OralArgumentResponseForm.pdf For the complete calendar go to http://www.ca8.uscourts.gov/webcal/mar08ust.pdf PLEASE REVIEW THE ENTIRE CALENDAR CAREFULLY, PARTICULARLY THE COUNSEL NOTICE PAGE. (TAB)

02/18/2008 ARGUMENT RESPONSE/ APPEARANCE FORM filed by Mr. Chad Schulze for Mary Doe, John Doe, Milavetz, Gallop & Milavetz, P.A., Mr. Robert J. Milavetz and Ms. Barbara N. Nevin for argument

	in March, at the St. Thomas University in Minneapolis, Minnesota. (CS)
02/21/2008	ARGUMENT RESPONSE/ APPEARANCE FORM filed by Mr. Mark R. Freeman for United.States for argument in March, at the St. Thomas University in Minneapolis, Minnesota. (MRF)
03/03/2008	APPEARANCE filed by Thomas F. Miller for Appellees John Doe and Mary Doe w/service 03/03/2008 (TFM)
03/11/2008	ARGUED & SUBMITTED in University of St. Thomas, Minneapolis, MN, to Judges Kermit E. Bye, Lavenski R. Smith, Steven M. Colloton. Mr. Mark R. Freeman for Appellant United States and Mr. Chad Schulze for Appellees Mary Doe, John Doe, Milavetz, Gallop & Milavetz, P.A., Mr. Robert J. Milavetz and Ms. Barbara N. Nevin. Rebuttal by Mr. Mark R. Freeman for United States RECORDED (CYZ)
06/24/2008	28(j) citation filed by Appellant United States w/service 06/24/2008 (MRF)

07/18/2008	Response of Appellees Mr. Robert J. Milavetz, Milavetz, Gallop & Milavetz, P.A. and Ms. Barbara N. Nevin to 28(j) citation, filed by United States in 07-2405. w/service 07/18/2008 (CS)
09/04/2008	OPINION FILED - THE COURT: KERMIT E. BYE, LAVENSKI R. SMITH and STEVEN M. COLLOTON. Lavenski R. Smith, Authoring Judge (PUBLISHED); CONCUR AND DISSENT BY: STEVEN M. COLLOTON (CMD)
09/04/2008	JUDGMENT FILED - The judgment of the originating court is AFFIRMED in part and REVERSED in part in accordance with the opinion. KERMIT E. BYE, LAVENSKI R. SMITH and STEVEN M. COLLOTON Hrg Mar 2008 (CMD)
09/23/2008	CORRECTED OPINION FILED: Sub-paragraph A. has been inserted on page 3, following Part II 09/04/2008 (SRD)

10/20/2008	PETITION for enbanc rehearing filed by Appellant United States w/service 10/20/2008 (MRF)
10/27/2008	CLERK LETTER sent notifying that party has an opportunity to respond to: petition for enbanc rehearing. (CMD)
11/05/2008	RESPONSE in opposition to petition for enbanc rehearing, filed by Attorney Mr. Chad Schulze for Appellees Mary Doe, John Doe, Milavetz, Gallop & Milavetz, P.A., Mr. Robert J. Milavetz and Ms. Barbara N. Nevin, w/service 11/05/2008. (CS)
12/05/2008	JUDGE ORDER:denying petition for enbanc rehearing filed by Appellant United States. Petition for panel rehearing is also denied. Judge Riley, Judge Colloton, Judge Gruender, Judge Benton and Judge Shepherd would grant the petition for rehearing en banc. PUBLISHED ORDER. Hrg Mar 2008 (CMD)
12/12/2008	MANDATE ISSUED. (CMD)
03/12/2009	U.S. Supreme Court Notice of cert filed in the Supreme Court on 03/09/2009, case No. 08-1119 (CMD)

06/08/2009	SUPREME COURT order filed granting cert petition. Order filed on 06/08/2009. (CMD)

United States District Court
District of Minnesota (DMN)
CIVIL DOCKET FOR CASE #: 0:05-cv-02626-JMR-FLN

Date Filed	#	Docket Text
11/14/2005	1	COMPLAINT against United States of America (Filing fee $ 250 receipt number 289302.) assigned to Judge Richard H. Kyle per Master referred to Magistrate Judge Arthur J. Boylan (4:05AD1570), filed by Mary Doe, Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin, John Doe.(LPH) Modified on 11/17/2005 (LJG). (Entered: 11/14/2005)
11/14/2005		Summons Issued as to United States of America, U.S. Attorney and U.S. Attorney General (LPH) (Entered: 11/14/2005)
11/14/2005	2	RULE 7.1 DISCLOSURE STATEMENT by Mary Doe, Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin, John Doe that there is no such parent or publicly held corporation to report.

		(LPH) (Entered: 11/14/2005)
11/14/2005	3	AMENDED COMPLAINT against United States of America, filed by Mary Doe, Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin, John Doe. (Schulze, Chad) (Entered: 11/14/2005)
11/15/2005	4	ORDER for Disqualification and for Reassignment. (Written Opinion). Signed by Judge Richard H. Kyle on 11/15/05. (rhks) (Entered: 11/15/2005)
11/17/2005		NOTICE to Attorney -- Case Reassigned to Judge James M. Rosenbaum and Magistrate Judge Franklin L. Noel. Judge Richard H. Kyle and Magistrate Judge Arthur J. Boylan no longer assigned to the case per Disqualification and Order for Reassignment dated 11/15/05. New Case No.: 05-2626 JMR/FLN. (LJG) (Entered: 11/17/2005)

12/07/2005		Amended Summons Issued as to United States of America, U.S. Attorney and U.S. Attorney General (JME) (Entered: 12/07/2005)
12/08/2005	6	SUMMONS Returned Executed by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin. United States of America served on 11/14/2005, answer due 1/13/2006. (Schulze, Chad) (Entered: 12/08/2005)
01/04/2006	7	MOTION for Admission Pro Hac Vice for Marcia K. Sowles by United States of America. (MMC) (Entered: 01/06/2006)
01/04/2006		TEXT ONLY ENTRY - ORDER granting 7 Motion for Admission Pro Hac Vice of Attorney Marcia K Sowles for United States of America. Fee waived for U.S. government attorney. Approved by Clerk Richard D Sletten on 1/4/06. (MMC) (Entered: 01/06/2006)

01/11/2006	8	Consent MOTION for Extension of Time to File Answer re 3 Amended Complaint by United States of America. (Sowles, Marcia) (Entered: 01/11/2006)
01/11/2006	9	Declaration of Marcia K. Sowles in Support of 8 Consent MOTION for Extension of Time to File Answer re 3 Amended Complaint filed by United States of America. (Sowles, Marcia) (Entered: 01/11/2006)
01/11/2006	10	MEMORANDUM in Support re 8 Consent MOTION for Extension of Time to File Answer re 3 Amended Complaint filed by United States of America. (Attachments: # 1 LR7.1 Word Count Compliance Certificate)(Sowles, Marcia) Modified on 1/11/2006 (mkc). (Entered: 01/11/2006)
01/11/2006	11	CERTIFICATE OF SERVICE re 8 Consent MOTION for Extension of Time to File Answer re 3 Amended Complaint, 9 Declaration in Support, 10

		Memorandum in Support of Motion by Marcia K Sowles on behalf of United States of America. (Sowles, Marcia) Modified title on 1/12/2006 (gjs). (Entered: 01/11/2006)
01/11/2006	12	ORDER granting 8 Motion for Extension of Time to Answer United States of America answer due 2/27/2006 . Signed by Magistrate Judge Franklin L Noel on 1/11/06. (GJS) (Entered: 01/11/2006)
01/27/2006	13	MOTION to Dismiss by United States of America. (Sowles, Marcia) (Entered: 01/27/2006)
01/27/2006	14	**DOCUMENT FILED IN ERROR - see doc. 18** #NOTICE by United States of America re 13 MOTION to Dismiss (Sowles, Marcia) Modified on 1/30/2006 (gjs). (Entered: 01/27/2006)
01/27/2006	15	MEMORANDUM in Support re 13 MOTION to Dismiss filed by United States of America. (Attachments: # 1

		LR7.1 Word Count Compliance Certificate)(Sowles, Marcia) (Entered: 01/27/2006)
01/27/2006	16	EXHIBIT re 15 Memorandum in Support of Motion to Dismiss by United States of America filed by United States of America. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E) (Sowles, Marcia) (Entered: 01/27/2006)
01/27/2006	17	CERTIFICATE of Counsel re 13 MOTION to Dismiss, 14 Notice (Other), 15 Memorandum in Support of Motion, 16 Exhibit by Marcia K Sowles on behalf of United States of America. (Sowles, Marcia) (Entered: 01/27/2006)
01/27/2006	18	NOTICE OF HEARING ON MOTION 13 MOTION to Dismiss: Motion Hearing set for 4/4/2006 11:00 AM in Minneapolis - Courtroom 15E before Chief Judge James M Rosenbaum. (Sowles, Marcia) (Entered: 01/27/2006)

03/14/2006	19	MEMORANDUM in Opposition re 13 MOTION to Dismiss filed by all plaintiffs. (Attachments: # 1 LR7.1 Word Count Compliance Certificate) (Schulze, Chad) (Entered: 03/14/2006)
03/14/2006	20	AFFIDAVIT of Barbara N. Nevin in OPPOSITION TO 13 MOTION to Dismiss filed by all plaintiffs. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C Part 1 # 4 Exhibit C Part 2 # 5 Exhibit D Part 1 # 6 Exhibit D Part 2) (Schulze, Chad) (Entered: 03/14/2006)
03/14/2006	21	CERTIFICATE OF SERVICE re: 13 MOTION to Dismiss filed by United States of America, by all plaintiffs filed by all plaintiffs. (Schulze, Chad) Modified title on 3/15/2006 (gjs). (Entered: 03/14/2006)
03/20/2006	22	UNOPPOSED MOTION for Leave to File Excess Pages *for Reply in Support of Defendant's Motion to Dismiss* by United States of America.

		(Sowles, Marcia) Modified title on 3/21/2006 (gjs). (Entered: 03/20/2006)
03/20/2006	23	MEMORANDUM in Support re 22 UNOPPOSED MOTION for Leave to File Excess Pages *for Reply in Support of Defendant's Motion to Dismiss* filed by United States of America. (Attachments: # 1 LR7.1 Word Count Compliance Certificate)(Sowles, Marcia) Modified on 3/21/2006 (GJS). (Entered: 03/20/2006)
03/20/2006	24	Declaration of Marcia K. Sowles in Support of 22 UNOPPOSED MOTION for Leave to File Excess Pages for Reply in Support of Defendant's Motion to Dismiss filed by United States of America. (Sowles, Marcia) Modified on 3/21/2006 (GJS). (Entered: 03/20/2006)
03/20/2006	25	CERTIFICATE OF SERVICE by United States of America re 22 Consent MOTION for Leave to File Excess Pages for Reply in Support of Defen-

		dant's Motion to Dismiss, 24 Declaration in Support, 23 Memorandum in Support of Motion, (Sowles, Marcia) (Entered: 03/20/2006)
03/20/2006	26	NOTICE REGARDING MOTION FOR EXTENSION OF LIMIT ON WORD COUNT by United States of America re 22 Consent MOTION for Leave to File Excess Pages (Sowles, Marcia) Modified title on 3/20/2006 (gjs). (Entered: 03/20/2006)
03/20/2006	27	CERTIFICATE OF SERVICE by United States of America re 26 Notice (Other) (Sowles, Marcia) (Entered: 03/20/2006)
03/23/2006	28	REPLY re 13 MOTION to Dismiss filed by United States of America. (Attachments: # 1 LR7.1 Word Count Compliance Certificate)(Sowles, Marcia) (Entered: 03/23/2006)
03/23/2006	29	CERTIFICATE OF SERVICE by United States of America re 28 Reply *in Support of Motion*

		to Dismiss (Sowles, Marcia) (Entered: 03/23/2006)
03/28/2006	30	ORDER denying 22 Motion for Leave to File Excess Pages. Signed by Chief Judge James M Rosenbaum on 3/28/2006. (HLL) (Entered: 03/28/2006)
04/04/2006		***TEXT ONLY ENTRY*** Minute Entry for proceedings held before Chief Judge James M Rosenbaum : Motion Hearing held on 4/4/2006 re 13 MOTION to Dismiss filed by United States of America. Motion taken under advisement. (Court Reporter Dawn Hansen) (HLL) (Entered: 04/05/2006)
07/27/2006	31	LETTER TO DISTRICT JUDGE by Mary Doe, Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin, John Doe *with attached order and memorandum*. (Attachments: # 1 Memorandum and Order)(Schulze, Chad) Modified on 7/28/2006 (gjs). (Entered: 07/27/2006)

12/07/2006	32	ORDER denying 13 Motion to Dismiss (Written Opinion). Signed by Judge James M. Rosenbaum on 12/7/06. (jjn) (Entered: 12/07/2006)
12/08/2006	33	NOTICE: Initial Pretrial Conference set for 1/9/2007 09:45 AM in Minneapolis - Courtroom 9W before Magistrate Judge Franklin L. Noel. Signed by Magistrate Judge Franklin L. Noel on 12/8/06. (jam) (Entered: 12/08/2006)
12/15/2006	34	SECOND AMENDED COMPLAINT *Second* against all defendants, filed by Plaintiffs.(Schulze, Chad) Modified on 12/18/2006 (gjs). (Entered: 12/15/2006)
12/19/2006	35	ANSWER to Second Amended Complaint by United States of America.(Sowles, Marcia) Modified on 12/20/2006 (gjs). (Entered: 12/19/2006)
12/20/2006	36	REPORT *Joint Rule 26F Report* by Milavetz, Gallop & Milavetz, P.A.. (Schulze, Chad) (Entered: 12/20/2006)

01/08/2007	37	MOTION for Judgment as a Matter of Law by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin. (Schulze, Chad) (Entered: 01/08/2007)
01/08/2007	38	MEMORANDUM in Support re 37 MOTION for Judgment as a Matter of Law filed by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin. (Attachments: # 1 LR7.1 Word Count Compliance Certificate)(Schulze, Chad) (Entered: 01/08/2007)
01/08/2007	39	Declaration of Chad Wm. Schulze in Support of 37 MOTION for Judgment as a Matter of Law, 38 Memorandum in Support of Motion filed by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin. (Schulze, Chad) (Entered: 01/08/2007)
01/08/2007	40	EXHIBIT A re 38 Memorandum in Support of Motion, 39 Declaration in Support, 37 MOTION for Judgment as a

		Matter of Law by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin filed by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin. (Attachments: # 1 Exhibit B # 2 Exhibit C Part 1 # 3 Exhibit C Part 2 # 4 Exhibit C Part 3 # 5 Exhibit E # 6 Exhibit D Part 1 # 7 Exhibit D Part 2 # 8 Exhibit D Part 3 # 9 Exhibit D Part 4) (Schulze, Chad) Modified text on 1/9/2007 (gjs). (Entered: 01/08/2007)
01/08/2007	41	AFFIDAVIT of Service by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin re 38 Memorandum in Support of Motion, 39 Declaration in Support, 37 MOTION for Judgment as a Matter of Law, 40 Exhibit,, (Schulze, Chad) (Entered: 01/08/2007)
01/09/2007	42	Minute Entry for proceedings held before Magistrate Judge Franklin L. Noel : Initial Pretrial Conference held on 1/9/2007. The parties agree

		that this case will be decided on summary judgment. The Court has already analyzed the legal issues in context of Defendant's motion to dismiss. Plaintiffs will apply for an award of attorneys? fees following the Court's ruling on summary judgment. (GJS) Additional attachment added on 1/9/06 (gjs)). Modified on 2/13/2007 (mkc). (Entered: 01/09/2007)
02/05/2007	43	MEMORANDUM in Opposition re 37 MOTION for Judgment as a Matter of Law filed by United States of America. (Attachments: # 1 Exhibit(s) A # 2 Exhibit(s) B # 3 Exhibit(s) C # 4 Exhibit(s) D # 5 LR7.1 Word Count Compliance Certificate # 6 Certificate of Service)(Sowles, Marcia) (Entered: 02/05/2007)
02/14/2007	44	REPLY to Response to Motion re 37 MOTION for Judgment as a Matter of Law filed by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin. (Attachments:

		# 1 LR7.1 Word Count Compliance Certificate)(Schulze, Chad) (Entered: 02/14/2007)
02/14/2007	45	CERTIFICATE OF SERVICE by Milavetz, Gallop & Milavetz, P.A., Robert J Milavetz, Barbara N. Nevin re 44 Reply to Response to Motion (Schulze, Chad) (Entered: 02/14/2007)
02/22/2007	46	NOTICE of Appearance by Thomas F Miller on behalf of Mary Doe, John Doe (Miller, Thomas) (Entered: 02/22/2007)
02/26/2007		***TEXT ONLY ENTRY*** Minute Entry for proceedings held before Chief Judge James M. Rosenbaum : Motion Hearing held on 2/26/2007 re 37 MOTION for Judgment as a Matter of Law filed by Robert J Milavetz, Milavetz, Gallop & Milavetz, P.A., and Barbara N. Nevin. Motion taken under advisement. (Court Reporter Dawn Hansen) (HLL) (Entered: 02/26/2007)

03/01/2007	47	NOTICE OF FILING by United States of America re 44 Reply to Response to Motion, 43 Memorandum in Opposition to Motion, 37 MOTION for Judgment as a Matter of Law (Attachments: # 1 Certificate of Service)(Sowles, Marcia) Modified title on 3/5/2007 (gjs). (Entered: 03/01/2007)
04/19/2007	48	ORDER granting 37 Plaintiffs' Motion for Summary Judgment. Signed by Judge James M. Rosenbaum on 04/19/07. (kl) (Entered: 04/19/2007)
04/19/2007	49	JUDGMENT (Attachments: # 1 Civil Notice - appeal # 2 Civil-8th Circuit Pre-Hearing Conference Notice)(kt) (Entered: 04/19/2007)
06/13/2007	50	NOTICE OF APPEAL TO 8TH CIRCUIT as to 49 Judgment, 48 Order on Motion for Judgment as a Matter of Law, 32 Order on Motion to Dismiss by United States of America. (Attachments: # 1 Certificate of Service)(Sowles, Marcia) (En-

		tered: 06/13/2007)
06/14/2007	51	LETTER from Clerk's Office transmitting Appeal to US Court of Appeals, 8th Circuit. CC: Alan Milavetz, Thomas Miller, Chad Schulze, and Marcia Sowles. (Attachments: # 1 COA - Form A # 2 COA - Form B # 3 Notice of Appeal) (kt) (Entered: 06/14/2007)
06/14/2007		*** COA BATCH RECEIPT of Notice of Appeal and related supporting documents sent on: Thu Jun 14 13:58:15 CDT 2007 (Thompson, Katie) (Entered: 06/14/2007)
06/14/2007		Electronic transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 50 Notice of Appeal to 8th Circuit. Transmitted electronically the following documents: Notice of Appeal, Order, Judgment and District Court's Docket Sheet. (kt) (Entered: 06/14/2007)

06/19/2007	52	USCA Case Number 07-2405 for 50 Notice of Appeal to 8th Circuit filed by United States of America. (akl) (Entered: 06/19/2007)
06/29/2007	53	TRANSCRIPT of Proceedings held on 4/4/06 before Judge James M Rosenbaum. Court Reporter: Dawn M H Hansen. (43pgs) FILED CONVENTIONALLY (kt) (Entered: 07/02/2007)
07/02/2007	54	Appeal Remark re 50 Notice of Appeal to 8th Circuit: Transmittal of 53 TRANSCRIPT to the US Court of Appeals, 8th Circuit. (kt) (Entered: 07/02/2007)
07/05/2007	55	LETTER - 1 volume of transcript received at USCA8 St. Paul on 7/3/07. (GJS) QC'd by MMC. (Entered: 07/06/2007)
09/04/2008	56	Opinion of USCA as to 50 Notice of Appeal to 8th Circuit (Judge Bye, Judge Smith, Judge Colloton): In sum, attorneys who provide bankruptcy assistance to assisted

		persons are debt relief agencies under the Bankruptcy Code, and § 526(a)(4) is unconstitutional as applied to these attorneys, but §§ 528(a)(4) and (b)(2) are constitutional. Accordingly, we affirm in part and reverse in part. (akl) (Entered: 09/11/2008)
09/04/2008	57	USCA JUDGMENT as to 50 Notice of Appeal to 8th Circuit: After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part in accordance with the opinion of this Court. (received electronically from COA) (akl) (Entered: 09/11/2008)
09/23/2008	58	Corrected Opinion of USCA as to 50 Notice of Appeal to 8th Circuit(Judge Bye, Judge Smith, Judge Colloton): In sum, attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, and § 526(a)(4) is unconstitutional as applied to

		these attorneys, but §§ 528(a)(4) and (b)(2) are constitutional. Accordingly, we affirm in part and reverse in part. (Attachments: # 1 Cover Letter)(akl) (Entered: 09/25/2008)
12/12/2008	59	MANDATE of USCA as to 50 Notice of Appeal to 8th Circuit filed by United States of America (received electronically from COA) (akl) (Entered: 12/16/2008)
04/24/2009	60	LETTER from Supreme Court of the United States re: The petition for a writ of certiorari in the above entitled case was filed on March 5, 2009 and placed on the docket March 9, 2009 as No. 08-1119(received electronically from COA). (Attachments: # 1 Cover Letter) (jam) (Entered: 04/27/2009)
06/15/2009	61	LETTER from US Supreme Court re: petition for a writ of certiorari is granted. (Attachments: # 1 Cover Letter)(jam) (Entered: 06/15/2009)

07/08/2009	62	NOTICE of Filing of Official Transcript. A total of 1 transcripts are associated with this filing. (dmh) (Entered: 07/08/2009)
07/08/2009	63	TRANSCRIPT of Motions Hearing held on 02-26-2007 before Judge James M. Rosenbaum. (17 pages). Court Reporter: Dawn Hansen (E-mail: Dawn_Hansen@mnd.uscourts.gov. Telephone: (612) 664-5107). Redaction Request due 7/29/2009. Redacted Transcript Deadline set for 8/10/2009. Release of Transcript Restriction set for 10/6/2009. For information on redaction procedures, please review Local Rule 5.5. (dmh) (Entered: 07/08/2009)

UNITED STATES DISTRICT COURT
FOURTH DIVISION
DISTRICT OF MINNESOTA

Milavetz, Gallop and Milavetz PA., Robert Milavetz, Barbara N. Nevin, John Doe and Mary Doe Plaintiffs, vs. United States of America, Defendant.	Civil No.: 05-CV-2626 RHK/AJB **FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This action seeks a declaratory judgment, that the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), appear to inappropriately classify attorneys as "debt relief agencies." Further, the BAPCPA's restrictions on "debt relief agen-

cies" if applied to attorneys, limits the attorneys' ability to ethically and competently advise and represent their clients and illegally restricts the attorneys' right to free speech. Also, the BAPCPA's restrictions on "debt relief agencies," if applied to attorneys, illegally restricts the public's right to receive information from attorneys, presumptively protected under the First Amendment of the United States Constitution.

2. It is asserted that the BAPCPA's restrictions on "debt relief agencies" if applied against attorneys, affirmatively prevents attorneys from conforming with the Minnesota Rules of Professional Responsibility, which requires attorneys to provide "competent representation" to their clients, (Minn. R. Prof. Resp. Rule 1.1) by denying attorneys the right of free speech with their clients, which is constitutionally protected by the First Amendment of the United States Constitution. BAPCPA limits the ability of attorneys to competently advise their clients and to advocate for them.

I. JURISDICTION AND VENUE

3. Plaintiffs bring this action to construe 11 U.S.C § 526(c)1-5 as it appears to authorize courts to enjoin "debt relief agencies" from certain actions and to impose civil penalties on the violator. Under BAPCPA the Bankruptcy Court has broad jurisdiction to both initiate a discipli-

nary action and punish a violation of the act. This provision has a constitutionally, impermissible chilling effect on First Amendment rights. Plaintiffs respectfully ask this court to declare that attorneys practicing in bankruptcy law are not subject to the provisions regulating "debt relief agencies."

4. 28 U.S.C. § 2201 (2005) permits any court of the United States, upon the filing of the appropriate pleading, to declare the rights and other legal relationships "of any interested party seeking such declaration, whether or not further relief is, or could be, sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

5. 11 U.S.C. § 526C(4) (2005) states: "the district courts of the United States for districts located in the State shall have **concurrent** jurisdiction of any action under subparagraph (A), (B) of paragraph (3)."

11 U.S.C.§ 526 (3) (2005) states:

> *(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--*

(A) may bring an action to enjoin such violation;
(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2)

II. PARTIES AND INTERESTS AFFECTED

6. Plaintiff Milavetz, Gallop and Milavetz P.A. is a professional legal association which is incorporated pursuant to the laws of the State of Minnesota. The address of Milavetz, Gallop and Milavetz P.A. is 6500 France Avenue South, Edina, Minnesota 55435.

7. Plaintiffs, Robert Milavetz and Barbara Nevin are attorneys who are citizens of the United States. Plaintiffs, Robert Milavetz and Barbara Nevin, are duly licensed attorneys by the Minnesota Supreme Court, and the Federal Court for the District of Minnesota. Plaintiffs, Robert Milavetz and Barbara Nevin, practice in the United States Bankruptcy Court in the State of Minnesota. Plaintiffs provide "bankruptcy assistance" to "assisted persons."

8 Plaintiff, Robert Milavetz, is a director and supervisor of associate attorneys, employed by the law firm, Plaintiff Milavetz, Gallop and Milavetz P.A.

9. Plaintiff, Barbara Nevin, is an associate attorney of Milavetz Gallop and Milavetz P.A.. Plaintiff Barbara Nevin's duties include representing clients in bankruptcy matters. Ms. Nevin has currently fulfilled the attorney requirements for certification in order to file bankruptcies through electronic filing in the United States Bankruptcy Court. Ms. Nevin currently drafts, reviews and files all of the bankruptcy petitions filed by Milavetz, Gallop and Milavetz P.A. in the United States Bankruptcy Court in Minnesota.

10. Plaintiffs John Doe and Mary Roe are members of the public who wish to obtain legal advise from plaintiff attorneys, and others similarly situated persons about possible bankruptcy and pre-bankruptcy planning, including their present and future assets, liabilities, income, and expenses.

11. Plaintiffs, Milavetz, Gallop and Milavetz P.A., and Barbara Nevin, are representing new clients under the Bankruptcy Code Amendments which took effect on October 17, 2005. Plaintiffs, Milavetz, Gallop and Milavetz P.A., Robert Milavetz and Barbara Nevin have advised and represented thousands of clients over the years in filing for relief under the United States bankruptcy laws. Plaintiffs have previously advertised their legal services as bank-

ruptcy attorneys in newspapers, telephone directories, television, radio, and the internet. Plaintiffs desire to continue to advertise, pursuant to the First Amendment of the U.S. Constitution, practicing as bankruptcy attorneys and not as "debt relief agencies." There is considerable confusion as to what attorneys are allowed to do or not do under BAPCPA. Particularly, whether they must advertise as "debt relief agencies", rather than as bankruptcy attorneys and whether the proscriptions against "debt relief agencies" also apply to bankruptcy attorneys.

12. Milavetz, Gallop and Milavetz P.A., desires to practice bankruptcy law consistent with the Minnesota Rules of Professional Conduct, and does not intend to engage in a separate commercial enterprise as a "debt relief agency," or call itself a "debt relief agency."

III. AVERMENTS OF FACT

13. The BAPCPA can be read to give an absurd, unintended and unconstitutional meaning in that attorneys may be defined in the statute as within the inclusion of the term "debt relief agency," while Congress did not intend this result.

14. If the term "debt relief agency" was defined to not include attorneys and was not appli-

cable to Plaintiffs and other attorneys, Plaintiffs would not claim that the statute was unconstitutionally violative as to themselves and other persons similarly situated.

15. The relevant portions of the BAPCPA are 11 U.S.C. §s. 101, 526 & 528 (2005) provide:

A. 11 U.S.C. § 101 (2005) defines an attorney as::

The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

B. 11 U.S.C.§ 101 (12)(A)(2005) defines a "debt relief agency" as follows:

The term "debt relief agency" ***means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110 [11 USCS § 110],*** *but does not include -- (emphasis supplied)*

any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)],

a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

a depository institution (as defined in section 3 of the Federal Deposit Insurance Act [12 USCS § 1813]) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act [12 USCS § 1752]), or any affiliate or subsidiary of such depository institution or credit union; or

an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

C. The above section does not expressly include, nor exclude, attorneys as debt relief agencies. The statute is unconstitutionally ambiguous, in that its definition of **bankruptcy assistance** includes **legal representation.** The term bankruptcy assistance can be read to give an absurd result to this chapter.

D. Bankruptcy assistance is defined in section 101 4 a as follows;

> The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another **or providing legal representation** with respect to a case or proceeding under this title. (emphasis supplied)

E. 11 U.S.C. § 126(a) 1-4 states the following things a "debt relief agency" may not do.
a) A debt relief agency shall not--

> *(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;*
>
> *(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;*

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to-
(A) the services that such agency will provide to such person; or
(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title. *11 (Emphasis added).*

F. 11 U.S.C. § 528 (2005) a-b also places the following restrictions on debt relief agencies.
(a) A debt relief agency shall--

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b) (1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes--
(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan

whether or not chapter 13 is specifically mentioned in such advertisement; and
(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall–
(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and
(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

IV. AVERMENTS OF LAW

16. The First Amendment to the United States Constitution protects citizens from governmental infringement upon the right to freedom of speech, the right of associational freedom and expression, the right to peaceably assemble and to petition for redress of grievances.

17. The Fifth Amendment guarantees that life, liberty and property will not be deprived without due process of law.

18. By implication, the Fifth Amendment guarantees the right to equal protection of the law.

19. Each of these constitutional rights and privileges is clearly established and well-defined.

20. The defendant, therefore, knows or should know that enforcement of the challenged provisions of the BAPCPA, as established in 2005, will violate the Federal Constitutional rights of Plaintiffs and other persons similarly situated.

21. The denial of rights guaranteed to Plaintiffs, and other members of the public, under the First and Fifth Amendments of the United States Constitution inflicts an irreparable injury to Plaintiffs and other persons similarly situated.

22. There is no adequate remedy at law for the injuries threatened against Plaintiffs and other members of the public.

CLAIMS OF INJURY

COUNT ONE: VIOLATION OF RIGHTS GUARANTEED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

23. The facts stated herein above are incorporated herein by reference as though fully set out.

24. BAPCPA, as enacted, appears to deny attorneys the right to have certain communications with prospective clients. For example the BAPCPA states that a "debt relief agency" shall not:

> ***(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.***

25. The BAPCPA chills attorney's federally protected rights and ethical obligations to prop-

erly advise and counsel their clients. Restrictions on a "debt relief agency," if applied to Plaintiff attorneys, would unconstitutionally limit their obligation in pre-bankruptcy counseling. Attorneys have the right to advise their clients over a broad range of subjects which are prohibited to debt relief agencies.

26. By way of illustration, not intending to be exhaustive, Attorneys must be able to advise their client whether to refinance a home or obtain a mortgage with a lower interest rate prior to filing bankruptcy.

27. BAPCPA has a chilling effect upon attorneys who wish to consult with, advise and counsel their clients regarding all of their options involving future financial plans, including the possibility of refinancing their home, co-signing on a child's educational loan, obtaining emergency medical and dental assistance, and other obligations that they wish to discuss without a fraudulent intent. This law is overbroad and it limits attorneys from giving their clients advise which is lawful, helpful, and does not advocate that they commit fraudulent acts.

28. 11 U.S.C. 526 of BAPCPA prohibits a "debt relief agency" from advising an "assisted person" to incur more debt in contemplation of bankruptcy. BAPCPA does not differentiate as to whether this advice pertains to a debt the

debtor intends to pay, or discharge in bankruptcy. Further, the BAPCPA chills an attorneys right to advise a client to file a Chapter 13 bankruptcy with a new debt for attorney fees to be paid over time under the plan.

29. The prohibition under (4) of 11 U.S.C.§ 526 (2005) against advice to pay an attorney in a bankruptcy case, is violative of the First Amendment to the Constitution of the United States whether or not an attorney is within the definition of a "debt relief agency." This provision of BAPCPA should be judicially removed and Plaintiff attorneys have standing to request this relief.

30. Advocacy and right to legal advocacy are the kind of core, political speech that the First Amendment Free Speech Clause places beyond the reach of the Congress. *Legal Services Corp. V. Velazquez.* 531 U.S. 533. (2001), held that

> ***Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a***

> ***broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, see Arkansas Ed. Television Comm'n, supra, and Rosenberger, supra, it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.*** *at 1050_. (emphasis added).*

31. BAPCPA's prohibition on advocacy and right to legal advocacy communications is an unconstitutional abridgement of Plaintiffs' First Amendment rights of free speech.

32. No government interest justifies this sweeping restriction on Plaintiffs' First Amendment right to freedom of speech that is effected by BAPCPA.

33. By chilling attorneys from engaging in legal advocacy, BAPCPA unconstitutionally abridges Plaintiffs' First Amendment right of free speech.

WHEREFORE Plaintiffs respectfully pray that this Court grant the relief set out below in the demand for judgment.

COUNT TWO: VIOLATION OF COMMERCIAL FREE SPEECH UNDER THE FIRST AMENDMENT.

34. The facts stated herein above are incorporated herein by reference as though fully set out.

35. BAPCPA prohibits such groups as Plaintiff Milavetz, Gallop and Milavetz, P.A. from engaging in certain marketing communications.

36 Congress contemplated that BAPCPA's prohibition against such marketing communications by legal advocacy organizations and corporations might be held unconstitutional.

37. The burden of the disclosure requirement as a "debt relief agency" is exacerbated by the timeliness of disclosure requirements, that require Plaintiff to publish such disclosures on all materials, including previously published telephone, internet, television and other forms of media advertising commencing October 17, 2005. Further, this requirement apparently applies to attorney and non-attorney petition preparers, which may further confuse the public.

38. Accordingly, BAPCPA's disclosure and reporting requirements violate the First Amendment by unconstitutionally burdening and chilling the freedom of association and free speech.

WHEREFORE Plaintiffs respectfully prays that this Court grant the relief set out below in the demand for judgment.

COUNT THREE: PLAINTIFFS HAVE STANDING TO ASSERT THAT BAPCPA IS OVERBROAD AND VIOLATES THE FIRST AMENDMENT

39. The facts stated herein above are incorporated herein by reference as though fully set out.

40. *Bigelow v. Virginia*, 421 U.S. 809, 815-16 (1975) held:

> *This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to he constitutionally privileged. The Court consistently has permitted "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own [*816] conduct could not be regulated by a statute drawn with the requisite narrow specificity."* ...

41. Plaintiffs, Milavetz Gallop and Milavetz P.A., Robert Milavetz, and Barbara Nevin are in imminent danger of being forced to choose between possibly violating BAPCPA and their ethical duty to properly advise their clients. 11

U.S.C. 26, states, attorneys cannot **"advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title."** This law is vague, overbroad, and creates a chilling effect upon lawyers whose duties include; discussing, counseling, receiving, and providing information to their client. This advise is presumptively protected under the First Amendment.

42. A declaratory judgment regarding this situation is crucial to attorneys attempting to advise their clients.

43. Plaintiffs have standing to assert on behalf of other attorneys and members of the public, in the State of Minnesota, that BAPCPA, because of its vagueness and overbreadth, has a chilling effect on the ability of attorneys to discuss with their clients pre-bankruptcy planning.

WHEREFORE, Plaintiffs respectfully prays that this Court grant the relief set out below in the demand for judgment

COUNT FOUR: VAGUENESS OF BAPCPA

44. The facts stated herein above are incorporated herein by reference as though fully set out.

45. BAPCPA prohibits, on pain of both civil and criminal penalties, communications that do not include "debt relief agency" in advertising for bankruptcy attorneys. The legislation does not define the term "debt relief agency" or "bankruptcy attorney" but rather uses the terms interchangeably, which is inconsistent with the definition of "debt relief agency".

46. Because the terms "debt relief agency," "bankruptcy attorney," "bankruptcy lawyer," and "non-debt relief agency" are unclear, BAPCPA's prohibition on communication does not adequately inform Plaintiffs whether the kinds of speech prohibited are the sorts for which it intends to advertise and advise clients.

47. Accordingly, BAPCPA's provisions governing communications are unconstitutionally void for vagueness under the First and Fifth Amendments.

48. A Bankruptcy Court in the United States, the Southern District of Georgia, acting upon its own motion, has ruled that "attorneys regularly admitted to the Bar of this Court or those admit-

ted pro hac vice are not covered by the provisions of the Code regulating debt relief agencies, including without limitation sections 101 (12A), (4A), 526, 527, and 528, and are excused from compliance with any of those requirements or provisions so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise." Please see *In the United States Bankruptcy Court for the Southern District of Georgia, In Re Attorneys at Law and Debt Relief Agencies,* October 17, 2005.

49. A declaratory judgment would promote uniformity in the proper enforcement of BAPCPA and exempt Minnesota licenced attorneys from its' requirements of "debt relief agencies."

WHEREFORE, Plaintiffs respectfully prays that this Court grant the relief set out below in the demand for judgment.

PRAYER FOR RELIEF

On the foregoing causes of action, Plaintiffs respectfully pray that the Court grant it the relief set forth below:

1. Plaintiffs respectfully pray the entry of a declaratory judgment, that the challenged provisions of BAPCPA, as enacted, violate the constitutional rights of Plaintiffs.

2. Plaintiffs respectfully pray the entry of a declaratory judgment that the provisions regulating debt relief agencies shall not be applicable to Milavetz, Gallop and Milavetz P.A., Robert Milavetz, Barbara Nevin and attorneys admitted to the Bar of this Court, and that the attorneys shall be excused from compliance with those requirements and provisions.

3. Plaintiffs respectfully pray the entry of an order granting to Plaintiffs their costs, including a reasonable award of attorneys fees, pursuant to Title 28 U.S.C. § 2412, the Equal Access to Justice Act.

4. Plaintiffs respectfully pray that the Court grant such other and further relief as it deems just in the circumstances.

Milavetz, Gallop and
Milavetz P.A.

Dated 11/14/2005

By /s/ Alan S. Milavetz
Alan S. Milavetz
No. 164677
Chad Wm. Schulze,
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UNITED STATES DISTRICT COURT

FOURTH DIVISION

DISTRICT OF MINNESOTA

Milavetz, Gallop and Milavetz PA., Robert Milavetz, Barbara N. Nevin,	Civil No.: 05-CV-2626 RHK/AJB
John Doe and Mary Doe	
Plaintiffs,	**AFFIDAVIT OF BARBARA NEVIN**
vs.	
United States of America,	
Defendant.	

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1. Barbara N. Nevin, being first duly sworn upon oath deposes and states:

2. I have reviewed the complaint and amended complaint of which I am one of the

Plaintiffs. Everything is true and correct in those complaints to the best of my knowledge. Mr. Robert Milavetz also reviewed the complaint and amended complaint in this matter. We directed Mr. Alan Milavetz to sign the complaint and the amended complaint.

3. I am an attorney who has been licensed since 1979 in the State of Minnesota. I have also been licensed since 1980 in Federal Court for the District of Minnesota. I am an associate attorney employed by Milavetz, Gallop and Milavetz P.A.

4. Mr. Robert Milavetz is an attorney who has been licensed in the State of Minnesota since 1963, and was admitted to the Federal Court for the District of Minnesota in 1966. He was also admitted to practice in the United States Supreme Court in 1971. Mr. Milavetz is a director and supervisor of attorneys at Milavetz, Gallop and Milavetz P.A.

5. Both Mr. Milavetz and myself represent "assisted persons" in bankruptcy matters. We are the Plaintiffs in this matter.

6. Both of us have consulted with clients, since BAPCPA took effect on October 17, 2005.

7. Part of Plaintiffs practice includes working in the field of consumer bankruptcy. Plaintiff's law firm filed approximately 180 Chapter 7 and Chapter 13 bankruptcies for its clients last year. We reviewed each of the petitions that we filed and also advised the clients in those cases.

8. Our law firm has also represented creditors in bankruptcy.

9. Part our my practice as an attorneys in this field, is to counsel clients prior to filing bankruptcy. We counsel clients on such matters as obtaining loans on homesteads or cars, prior to filing bankruptcy.

10. I have spoken with at least two clients since BAPCPA has been passed. One client wanted to know if they could refinance their home prior to filing. Another client indicated that they might need a new car. I have also advised numerous clients that they must pay for credit counseling prior to filing.

11. I have reviewed BAPCPA and I have attended at least three seminars regarding BAPCPA. I also spoke at a National Bankruptcy Institute Conference on February 10, 2006 regarding BAPCPA.

12. I have reviewed the section of BAPCPA which prohibits, lawyers/ debt relief agencies, from doing the following:

526 (a) ***(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing debtor in a case under this title.***

This law states I cannot advise an assisted person or prospective assistant person that they can incur more debt in contemplation of that person filing bankruptcy.

13. The advise that I would give the client would not be intended to have the client discharge the indebtedness in bankruptcy.

14. I am aware, concerned, and vigilant that attorneys such as myself refrain from advising our clients to commit fraudulent acts. I have not and would not counsel a client to commit a fraudulent act.

15. In all of the cases our office filed last year, I am not aware of any case our office filed where a discharge was set aside due to fraud.

16. Also, the following definitions define the role of a debt relief agency under the definition section of 101 of BAPCPA:

The term ***"debt relief agency"*** *means any person who* ***provides any bankruptcy assistance*** *to* ***an assisted person*** *in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110 [11 USCS § 110], but does not include --*

any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)];

a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

a depository institution (as defined in section 3 of the Federal Deposit Insurance Act [12 USCS § 1813]) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act [12 USCS § 1752]), or any affiliate or subsidiary of such depository institution or credit union; or

an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

*The term "**bankruptcy assistance**" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of **providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.***

17. Under the new law, A family law attorney for example, could be swept into the definition of being characterized as a debt relief agency.[1] Please see the article, *Nine Traps, and*

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[1] Imagine a woman goes to an attorney and says, "My ex-husband has just filed for bankruptcy. How will this affect me?" Like most folks, this woman's own debts are primarily consumer obligations, and her non-exempt assets are worth less than $ 150,000. Now, suppose the attorney:

. Looks over the property and debt allocation in the divorce decree and tells the woman which items might be excepted from the ex-husband's discharge.

. Attends the ex-husband's 341 meeting of creditors.

. Files a complaint to determine the dischargeability of any of the divorce debts.

Under the plain language of the definitions, the woman is an "assisted person" and the attorney has rendered "bankruptcy assistance." This attorney is a "debt relief agency" and must comply with all the mandates of Code 526-528.

Suppose all the attorney says to the woman is, "Let me look over the papers and I'll get back to you." That might be enough to become a DRA; the definition of "bankruptcy assistance" includes "services sold or otherwise provided ... with the

One Slap, Attorney Liability Under the New Bankruptcy Law, by Catherine E. Vance and Corrine Cooper, 79 Am. Bankr. L.J. 283 (Spring 2005).

18. I, as well as many of my colleagues, are uncertain, given the new law, as to when we are required to hold ourselves out to the public as "Debt Relief Agencies."

19. I am attaching as a true and correct copy of the congressional records dated March 9, 2005. In this record, Senator Russell Feingold explains his concerns regarding BAPCPA. More, he cites the support given his amendments to this act, by the American Bar Association.

20. A letter is referenced in this portion of the Congressional Record, by Thomas R. Schuck, National President of the American Bar Association that states in part, "In our view, the above-referenced provisions of the proposed legislation pose a serious threat to the efficient operation of the bankruptcy laws and the bankruptcy courts. We are joined in this opinion by many state and national bar associations and bankruptcy practitioners. " (please see attached exhibit A.)

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express or implied purpose of providing information, advice, [or] counsel." 79 Am. Bankr. L.J. 283, 293

21. Part of Plaintiff's practice also includes working in the field of personal injury. In many personal injury claims, we have been faced with the issues that arise where a personal injury claimant, who is a client of Plaintiff's law firm, is injured. Between the time the individual is injured and the time the case settles, the client may have no alternative but to consider bankruptcy options.

22. A severely injured person may exhaust, for instance, no fault insurance and may continue to require medical care. The question will, naturally, arise for that individual whether or not their bankruptcy attorney can provide advice on incurring debt, for instance, for future necessary medical treatment, surgery or other procedures.

23. Likewise, during the course of the year and the course of representation of injured individuals, it is a frequent occurrence that either the defendant or occasionally the defendant's insurance company will file bankruptcy and the injured party becomes the creditor.

FURTHER YOUR AFFIANT SAITH NOT,

Dated March 14-06

/s/ Barbara Nilva Nevin
Barbara Nilva Nevin

Subscribed and sworn
to before me this 14th
day of March, 2006.

/s/ Janine S. Hanson
Notary Public

[Notary Stamp on original]

13579889 4.LITIGATION

PETITIONER'S BRIEF

138 (4) (6)

Supreme Court, U.S.
FILED
AUG 25 2009
OFFICE OF THE CLERK

Nos. 08-1119, 08-1225

IN THE

Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, with due regard for the canon of constitutional avoidance, the phrase "debt relief agency," defined in 11 U.S.C. § 101(12A), excludes "attorney."

2. Whether 11 U.S.C. § 526(a)(4), prohibiting an attorney from advising a client to incur debt in contemplation of bankruptcy or to pay an attorney, violates the First Amendment's guarantee of free speech.

3. Whether 11 U.S.C. § 526(a)(4) may be construed narrowly, and, when construed narrowly, whether it is unconstitutionally vague.

4. Whether 11 U.S.C. § 528 improperly restrains commercial speech by requiring mandatory, misleading disclosures in an attorney's truthful, non-deceptive advertising in violation of the First Amendment's guarantee of free speech.

5. Whether 11 U.S.C. § 528, requiring mandatory, misleading disclosures in an attorney's truthful, non-deceptive advertising, violates Fifth Amendment Due Process.

PARTIES TO THE PROCEEDING

Petitioners are the law firm Milavetz, Gallop & Milavetz, P.A.; attorney Robert J. Milavetz, president of Milavetz, Gallop & Milavetz, P.A.; attorney Barbara N. Nevin; and individuals Ronald and Lynette Richardson. Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Milavetz, Gallop & Milavetz, P.A. discloses that it has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PRELIMINARY STATEMENT

Petitioners are Robert J. Milavetz and Barbara N. Nevin, two attorneys licensed to practice law in the State of Minnesota; the law firm Milavetz, Gallop & Milavetz, P.A.; and two individuals, Ronald and Lynette Richardson. Petitioners challenge the constitutionality of sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) of the Bankruptcy Code, 11 U.S.C. §§ 526(a)(4), 528 (a)(4), and 528(b)(2)(B), asserting that these provisions violate the First Amendment.

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. A-18, is reported at 541 F.3d 785. The order of the district court granting petitioners' motion for summary judgment, Pet. App. A-16, is not reported. The opinion of the district court denying the Government's motion to dismiss, Pet. App. A-1, is reported at 355 B.R. 758.

JURISDICTION

The court of appeals entered its judgment on September 4, 2008. The court of appeals denied rehearing on December 5, 2008. Petitioners timely filed their petition for writ of certiorari on March 5, 2009. The Government timely requested, and was granted, an extension of time to file its petition for writ of certiorari until April

6, 2009. The Government timely filed its petition for writ of certiorari on April 3, 2009. On June 8, 2009, the Court granted both petitions and consolidated the cases. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The relevant statutory provisions are 11 U.S.C. §§ 101(3), 101(4), 101(4A), 101(5), 101(12), 101(12A), 110(a), 329, 526(a)(4), 528(a)(4), and 528(b)(2)(B). These statutory provisions are reproduced in the appendix at the end of this brief.

STATEMENT OF THE CASE

In 2005, Congress amended the Bankruptcy Code to add section 526(a)(4), which provides in pertinent part:

> A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer . . .

11 U.S.C. § 526(a)(4). The Government contends that the phrase "debt relief agency" includes "at-

torneys," and, therefore, attorneys subject to the provision are barred from advising any "assisted person," including a client, to "incur debt" in contemplation of bankruptcy or "to pay an attorney."

In 2005, Congress further amended the Code to add sections 528(a)(4) and 528(b)(2)(B). Section 528(a)(4) provides in pertinent part:

> A debt relief agency shall . . . clearly and conspicuously use the following statement in [any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public]: 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement.

11 U.S.C. § 528(a)(4). Similarly, section 528(b)(2)(B) provides:

> An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall . . . include the following statement: 'We are a debt relief agency. We help people

> file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement.

11 U.S.C. § 528(b)(2)(B). The Government contends that these provisions also apply to attorneys, and, accordingly, attorneys subject to their terms are required to disclose in their advertisements the statements directed by these sections.

A. General Background

Petitioners Robert Milavetz and Barbara Nevin are attorneys who provide bankruptcy advice and counseling to clients. Joint App. 37a. They practice as part of petitioner law firm Milavetz, Gallop, and Milavetz, P.A. Joint App. 37a-38a. Petitioners Ronald and Lynette Richardson are two individuals who sought bankruptcy advice from the firm. Joint App. 38a.

Petitioners Milavetz, Nevin, and their law firm work in the consumer bankruptcy field, representing debtors and creditors. Joint App. 60a. Collectively, they have advised thousands of clients who have filed for bankruptcy relief. Joint App. 38a. Among other things, they have been called upon to counsel clients on such matters as obtaining home or car loans prior to filing for bankruptcy. Joint App. 60a. Petitioners adver-

tise their legal services in newspapers, telephone directories, television, radio, and the internet. Joint App. 38a-39a.

B. Course of the Proceedings Below

Petitioners filed an action in the district court seeking a declaration that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to attorneys. Alternatively, petitioners contended that, if these provisions apply to attorneys, they are unconstitutional under the First Amendment. Joint App. 34a-35a. Petitioners asserted both "facial" and "as-applied" challenges to these provisions. *See, e.g.*, Joint App. 48a, 53a-54a.

On January 11, 2006, the Government moved to dismiss petitioners' complaint. On December 7, 2006, the district court denied the Government's motion to dismiss, ruling instead that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) are unconstitutional, and that they do not apply to attorneys. Pet. App. A-15.

Applying "strict scrutiny" to section 526(a)(4), the court invalidated the provision as an impermissible "content-based" restriction that was not "narrowly tailored" to serve a "compelling" governmental interest. Pet. App. A-6. Applying "intermediate scrutiny" to sections 528(a)(4) & (b)(2)(B), the court likewise invali-

dated these provisions on the grounds that they failed to "advance" a substantial governmental interest and were not "narrowly drawn." Pet. App. A-7-8.

In the alternative, the district court also ruled that, as a matter of statutory interpretation, the term "debt relief agency" does not include "attorneys." Pet. App. A-15. The court observed that the definition of "debt relief agency" is ambiguous, Pet. App. A-13, and, invoking the canon of avoiding constitutional issues, held that "attorneys" falls outside the scope of sections 526(a)(4), 528(a)(4), and 528(b)(2)(B). Pet. App. A-15. Subsequently, on April 19, 2007, the court entered summary judgment in petitioners' favor. Pet. App. A-16-17.

On appeal, the Eighth Circuit affirmed the district court's ruling that section 526(a)(4) is unconstitutional, but reversed the court's holdings concerning sections 528(a)(4) & (b)(2)(B), and whether the phrase "debt relief agency" includes "attorneys." Pet. App. A-39. With respect to section 526(a)(4), the court reasoned that, regardless of whether it applied "strict scrutiny" or the lesser standard of review articulated in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), the statute was not "narrowly tailored, nor narrowly and necessarily limited," to restrict only the speech the Government had a legitimate interest in restricting. Pet. App. A-30.

Turning to sections 528(a)(4) & (b)(2)(B), the court upheld these provisions, reasoning that they were "reasonably related" to the governmental interest of requiring accurate advertising disclosures. Pet. App. A-39. The court also concluded that the phrase "debt relief agency" plainly encompasses attorneys. *Id.*

SUMMARY OF THE ARGUMENT

This case involves a series of statutory provisions that, if applicable to attorneys, strike at the heart of fundamental First Amendment values, place attorneys in conflict with applicable state ethical regulations, and compel attorneys to make confusing and misleading disclosures.

Section 526(a)(4) provides that a "debt relief agency" shall not "advise" an "assisted person or prospective assisted person" to "incur more debt in contemplation of" filing a case under the Bankruptcy Code or "to pay an attorney." 11 U.S.C. § 526(a)(4). If section 526(a)(4) is interpreted to apply to attorneys, it is unconstitutional because it impermissibly interferes with a lawyer's obligation to truthfully advise a client regarding a client's entirely lawful conduct. It is also unconstitutional because it impermissibly interferes with the client's right to receive the attorney's advice.

In turn, sections 528(a)(4) & (b)(2)(B) collectively provide that a "debt relief agency" shall clearly and conspicuously state in any advertisement regarding *inter alia* "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures," and "eviction proceedings," that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. §§ 528(a)(4), (b)(2)(B). If these compelled statements are interpreted to apply to attorneys, they are likewise unconstitutional because they impermissibly regulate the content of truthful, non-deceptive advertising, and additionally render this advertising confusing and misleading.

In this case, there are numerous reasons to conclude that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to attorneys, thus avoiding these constitutional questions. Each provision applies to attorneys only if "attorney" is included within the definition of "debt relief agency." For a number of reasons, the phrase "debt relief agency" does not unambiguously include attorneys. Likewise, including attorneys within the scope of the phrase "debt relief agency" would generate absurd results. Further, it is "fairly possible" to construe the phrase "debt relief agency" as not encompassing "attorneys," thus avoiding the question of the constitutionality of these statutory provisions. In addition, the Court should determine that "debt relief agency"

does not encompass attorneys because concluding otherwise would interfere seriously with the relationship between attorneys and their clients – an area of traditional state regulation. Before the Court will interpret a federal statute to have this effect, it generally requires that Congress' intent to interfere must be "clear and manifest." Because the requisite "clear and manifest" expression of intent is lacking in this case, the Court should conclude that Congress did not intend to include "attorneys" within the scope of "debt relief agency."

If "debt relief agency" *does* include attorneys, section 526(a)(4) is unconstitutional. Section 526(a)(4) improperly purports to prevent an attorney from providing truthful information to a client regarding the client's lawful conduct. Although the Government contends that section 526(a)(4) properly constrains only certain narrow categories of wrongful behavior, the statute cannot be limited in this way, and is substantially overbroad. Among other reasons, construing the statute in the manner the Government suggests would render the statute impermissibly vague.

Alternatively, section 526(a)(4) is an improper content-based restriction that fails to satisfy the requirements of strict scrutiny. To begin with, the Government cannot articulate a compelling interest to justify the statute's interference with an attorney's advice to a client regard-

ing the client's activities. In addition, section 526(a)(4) is not narrowly tailored to serve any such interest.

The Government contended below that, rather than apply strict scrutiny, section 526(a)(4) should be reviewed under the somewhat more relaxed standard applied in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Pet. App. A-29. *Gentile*, however, has no application here. In any event, the Government cannot satisfy the *Gentile* standard because, among other things, section 526(a)(4) is not narrowly tailored to serve the Government's alleged interest.

If "debt relief agency" includes attorneys, sections 528(a)(4) & (b)(2)(B) are also unconstitutional. These sections improperly purport to restrict the content of truthful and non-deceptive advertising. The Government contends that Congress' interest in regulating advertising under these sections is to prevent a particular type of deception. The advertising that petitioners engage in, however, is not of the allegedly proscribed type. Accordingly, there is no legitimate reason to require petitioners to make the disclosures that these statutory provisions direct. Worse, the compelled disclosures are themselves unwanted, confusing, and misleading.

The provisions of sections 528(a)(4) & (b)(2)(B) do not meet the requirements of inter-

mediate scrutiny. Petitioners' advertising is truthful and non-misleading, and the Government lacks a substantial interest in regulating advertising that is truthful and non-deceptive. The Government cannot demonstrate that its regulation directly and materially advances its interest. Finally, sections 528(a)(4) & (b)(2)(B) are not narrowly drawn.

Even if intermediate scrutiny were inapplicable in this case, sections 528(a)(4) and 528(b)(2)(B) are not "reasonably related" to any interest in preventing deception. The sections themselves are confusing and misleading, and impose regulations – and sanctions for failure to comply with them – that are vastly disproportionate to any harm the Government seeks to redress.

For these reasons, and as explained more fully below, the Court should conclude that the phrase "debt relief agency" does not include attorneys, and, therefore, that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to petitioners. Alternatively, the Court should affirm the decision of the Eighth Circuit that section 526(a)(4) is unconstitutional, and reverse the decision of the lower court upholding the constitutionality of sections 528(a)(4) & (b)(2)(B).

ARGUMENT

I. The Phrase "Debt Relief Agency" Does Not Include Attorneys.

The plain meaning of a statute ordinarily controls its construction. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). This mandate does not apply, however, if the statutory language is ambiguous or the plain meaning leads to an absurd result. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (finding statutory language to be ambiguous); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989) (agreeing that, because of the oddity of the result, the particular provision could not "mean what it says"); *Gleason v. Thaw*, 236 U.S. 558, 560 (1915) (interpreting section of the Bankruptcy Act of 1898 to avoid absurdity in its application).

In addition, where the constitutionality of a statute is challenged, it is a "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (citations and marks omitted). Finally, in order for a section of the Bankruptcy Code to displace state law in an area traditionally subject to comprehensive state regulation, this Court has required that the requisite federal

statutory intent must be "clear and manifest." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (declining to adopt an interpretation of section 548 of the Bankruptcy Code that would have disrupted state regulation of real property titles through state law foreclosure proceedings, stating "[t]o displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'") (citations omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'") (citation omitted).

The definition of "debt relief agency" in section 101(12A) does not unambiguously encompass "attorneys." Further, inclusion of "attorneys" within the scope of section 101(12A) yields results that are properly described as "absurd." For these reasons, the Court should conclude that "attorneys" do not fall within the scope of "debt relief agency."

Alternatively, even if section 101(12A) is not formally ambiguous, it is at least "fairly possible" to construe the phrase "debt relief agency" as excluding attorneys, thus avoiding the question of the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B). This conclusion is all the more appropriate because including attorneys

within the definition of "debt relief agency" trenches seriously upon the relationship between attorneys and their existing and prospective clients, thus interfering with traditional state regulation of the practice of law without a federal statutory directive that is "clear and manifest."

A. The Phrase "Debt Relief Agency" Does Not Unambiguously Include Attorneys, and Treating Attorneys As Debt Relief Agencies Generates Absurd Results.

As a general matter, a statute is ambiguous if its language admits of more than one plausible interpretation. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 n.2 (2005). In considering whether a statute may be read plausibly in more than one way, it is not sufficient to consider the text of the provision in isolation: statutory ambiguity "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (construing several sections of the Bankruptcy Code together and observing

that "[s]tatutory construction . . . is a holistic endeavor"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936).

Context is critical for several reasons. To begin with, a statutory provision that seems clear in isolation may, in fact, be ambiguous when considered in the larger context of the statutory scheme of which it is a part. *See Robinson*, 519 U.S. at 341 (observing that, although the term "employees" as used in a particular statute appeared "[a]t first blush" to mean current employees, "[t]his initial impression...[did] not withstand scrutiny in the context of" that section at issue in light of the entire statutory scheme). Conversely, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," because, for example, "the same terminology is used elsewhere in a context that makes its meaning clear...or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Timbers*, 484 U.S. at 371 (citations omitted).

Section 101(12A) provides that "debt relief agency" means, in part, "any person who provides any bankruptcy assistance to an assisted person." 11 U.S.C. § 101(12)(A). Read in isolation, the phrase "any person" might appear at first blush to include "attorney." This facial im-

pression, however, does not withstand contextual scrutiny.

First, if Congress had intended to include "attorney" within the scope of section 101(12A), it almost certainly would have done so expressly by mentioning the term "attorney" at least somewhere in the section. "Attorney" is a defined term under the Code, and, as a general matter, whenever Congress intends specifically to include "attorney" within the scope of a particular section it does so expressly. *See, e.g.*, *id.* §§ 502(b)(4), 504, 1103(b). This is especially true when Congress intends to regulate the conduct of attorneys and their provision of legal services in relation to bankruptcy proceedings. *See, e.g.*, 11 U.S.C. §§ 327, 328, 329, 330, 331.

For example, section 329 regulates certain fee arrangements between a debtor and the debtor's attorney, and specifically uses the term "attorney" in its prescriptions. 11 U.S.C. § 329. Historically, section 329 derives from section 60d of the former Bankruptcy Act of 1898, 11 U.S.C. § 96d (repealed 1979), which, like other provisions of the Act addressing attorneys, also specifically used the term "attorney." Given this longstanding convention, it is striking that Congress specifically declined to mention "attorney" anywhere in the definition of "debt relief agency." Indeed, Congress' careful and specific mention of "attorney" throughout section 329

and other similar provisions of the Code serves only to highlight the contrasting incongruity of section 101(12A). *See also* 18 U.S.C. § 155 (prescribing criminal penalties for certain fraudulent agreements to fix the fees of an "attorney" who provides certain legal services in connection with a bankruptcy case).

As this Court has explained, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations and marks omitted). The fact that Congress specifically references "attorney" in multiple provisions of the Code, but not anywhere in section 101(12A), indicates that Congress did not intend "attorney" to fall within the definition of "debt relief agency."

Second, Congress' failure to mention the term "attorney" anywhere in section 101(12A) is all the more striking because Congress specifically stated in section 101(12A) that a "bankruptcy petition preparer" is a "debt relief agency." This is noteworthy because a "bankruptcy petition preparer" is *already* defined elsewhere in the Code as essentially a person who provides bankruptcy assistance to an assisted person and, thus, a bankruptcy petition

preparer falls readily within the definition of "debt relief agency" without the need for any express reference to "bankruptcy petition preparer" in section 101(12A). Specifically, section 110 of the Code already defines a "bankruptcy petition preparer" as "a person, other than an attorney . . . who prepares for compensation a document for filing" in a bankruptcy case – a quintessential form of "bankruptcy assistance" provided to an "assisted person." 11 U.S.C. § 110(a). In contrast, the Code defines "attorney" as simply "attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4).

Given that "bankruptcy petition preparer" is already defined in section 110 as a type of person who falls readily within the category of those who provide bankruptcy assistance to assisted persons, whereas "attorney" is *not* already defined in this way, one would expect Congress to have expressly designated "attorney" as a "debt relief agency" if that had been Congress' intent, and not "bankruptcy petition preparer." Yet Congress did precisely the opposite, specifically designating "bankruptcy petition preparer" as falling within the scope of section 101(12A) even though doing so was essentially redundant. Congress was thus exceptionally careful to ensure that "bankruptcy petition preparer" was included, and, presumably, if Congress had intended to include "attorney" within the scope of

section 101(12A), it would have been at least as careful, given that the definition of "attorney" in section 101(4) does not by itself place attorneys within the scope of the definition of "debt relief agency." This also supports the conclusion that Congress did not include attorneys as "debt relief agencies."

Third, reference to the full text of section 101(12A), and particularly the types of entities that are *excluded* from the scope of "debt relief agency" under certain circumstances, further suggests that Congress did not intend "debt relief agency" to include "attorneys." To begin with, section 101(12A) excludes from the definition of "debt relief agency" "any person who is an officer, director, employee, or agent of a person who provides assistance." 11 U.S.C. § 101(12A)(A). For example, if a "bankruptcy petition preparer" is a corporation, the exclusion in section 101(12A)(A) shields the corporation's officers, directors, and employees who are not themselves providing "bankruptcy assistance" to an "assisted person" from compliance with the provisions of the Code applicable to debt relief agencies, as well as potential liabilities associated with failure to comply. Lawyers and law firms, however, are commonly organized as partnerships with partners, associates, and counsel, rather than as corporations with officers and directors. It is clear that Congress understood this because the definition of "attorney" in section

101(4) specifically includes a "partnership" authorized under applicable law to practice law.

Including "attorney" within the definition of "debt relief agency" in section 101(12A) would thus create the anomaly that, in the case of a 500-attorney law firm organized as a partnership, if merely one attorney "provides any bankruptcy assistance to an assisted person" then the entire firm and all of its partners would be a "debt relief agency" subject to all of the attendant requirements of sections 526 and 528, and associated liabilities. Yet, in the case of a 10-employee corporate "bankruptcy petition preparer," the opposite would be true because the officers and directors of a corporation are excepted from the definition. This contrasting result makes little sense. If Congress had intended attorneys to be "debt relief agencies," presumably Congress would have crafted the exclusion in section 101(12A)(A) in a way that mirrors the reality that lawyers and law firms are commonly organized as partnerships.

As this Court has explained, under the canon *noscitur a sociis*, "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (citations and marks omitted). Further, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of

many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co. Polaroid Corp.*, 367 U.S. 303, 307 (1961) (citation omitted). The term "any person" is likewise capable of many meanings and potential overbreadth. Construed in context, it is properly limited by reference to section 101(12A)(A), the terms of which suggest that Congress did not intend to include attorneys within the scope of "debt relief agency." *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (applying *noscitur* canon and construing phrase "other legal process" narrowly to conform to usage in statute); *Gleason*, 236 U.S. at 560 (interpreting the general term "property" narrowly in the discharge section of the Bankruptcy Act where a broad interpretation would be contrary to the context of the term as used in other sections); *Neal v. Clark*, 95 U.S. 704, 708-09 (1877) (limiting the meaning of the term "fraud" as used in the bankruptcy laws to instances of active fraud, not implied fraud, by reference to surrounding terms).

In addition, section 101(12A)(C) further excludes from the definition of "debt relief agency" a "creditor" of an assisted person "to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor." 11 U.S.C. § 101(12A)(C). Notably, attorneys are often "credi-

tors" of the bankrupt debtors they advise and represent because these attorneys often receive their fees over time, particularly in chapter 13 cases. Indeed, the provisions of chapter 13 specifically contemplate that the debtor's attorney will be paid over time as an administrative expense under the debtor's plan – with a plan being *the* quintessential form of "restructuring" of a debt. *See* 11 U.S.C. § 1326(b)(1); *In re Sanders*, 347 B.R. 776, 780 (N.D. Ala. 2006) (the claim of the debtor's bankruptcy attorney for unpaid fees are properly paid out as an expense of administration under the debtor's chapter 13 plan along with other priority claims); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (Brennan, J., plurality opinion) ("[T]he restructuring of debtor-creditor relations...is at the core of the federal bankruptcy power"); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 530 (1936).

Accordingly, with respect to the payment of his or her own fee, the attorney in this situation would *not* be a "debt relief agency" because of the exclusion stated in section 101(12A)(C), and could thus advise his or her client to incur additional debt to pay the fee to be restructured under the plan, even though section 526(a)(4) provides that a debt relief agency "shall not...advise an assisted person...to incur more debt...to pay an attorney." 11 U.S.C. § 526(a)(4). This anomaly further indicates that Congress did not in-

tend attorneys to be included within the scope of "debt relief agency."

Fourth, including "attorney" within the scope of "debt relief agency" would lead to the anomalous result of requiring some bankruptcy attorneys to plainly misrepresent their services to the public. As noted, a "debt relief agency" is required under sections 528(a)(4) and 528(b)(2)(B) to state in their advertizing: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. §§ 528(a)(4), (b)(2)(B). As also noted, a "debt relief agency" is defined as a person who provides "bankruptcy assistance" to an "assisted person." In turn, an "assisted person" is *anyone* who has primarily consumer debts and relatively few assets. In other words, the definition of "assisted person" is not limited to debtors. Nor is the definition of "bankruptcy assistance" limited to assistance provided to debtors. Indeed, an assisted person may be a *creditor*, so long as the creditor has primarily consumer debts and relatively little property – for example, a tort victim with limited assets seeking bankruptcy representation in order to collect a wrongful injury claim against a bankrupt individual or corporation. *Connecticut Bar Ass'n v. United States*, 394 B.R. 274, 281 (D. Conn. 2008) (finding that "assisted person" includes "customers of a failed business, non-debtor spouses, or anyone else who may need

representation related to a bankruptcy proceeding").

There are a large number of bankruptcy attorneys who *only* advise and represent creditors. Yet if the term "debt relief agency" includes "attorney," then any attorney who represents a *creditor* who falls within the definition of "assisted person" will nevertheless be required to make the disclosures directed by 528(a)(4) and (b)(2)(B) – a result that is absurd because, as applied to these attorneys, these disclosures would be plainly false and misleading as these attorneys do not help people file for bankruptcy relief.[1]

Fifth, including "attorney" within the scope of "debt relief agency" would have the additionally absurd result of requiring an attorney to refrain in some circumstances from giving perfectly legitimate, beneficial advice to a debtor client. As noted, section 526(a)(4) provides that a "debt relief agency" shall not "advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing" for bankruptcy or "to pay an attorney." 11 U.S.C. § 526(a)(4). Of course, there are numerous instances in which it is in the best interests of the

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[1] The same anomalous problem does not arise with respect to bankruptcy petition preparers because they do not provide services to creditors.

debtor, as well as the debtor's creditors, for the debtor to incur new debt in contemplation of bankruptcy. For example, it may be beneficial to advise a debtor to incur new debt for the purpose of refinancing an existing loan at a lower interest rate, thus lowering the overall burden on the debtor's resources. It may also be beneficial to advise a debtor to incur new debt for the purpose of purchasing a car to commute to work in order to earn the wages necessary to fund a chapter 13 plan.[2] Apart from the obvious absurdity of prohibiting this kind of counsel, section 526(a)(4) sets up an untenable conflict between its provisions and the attorney's ethical obligation to counsel his or her client in a fully complete and competent way.[3] Indeed, in many circumstances an attorney cannot comply with both section 526(a)(4) *and* applicable state law ethical regulations because the two inherently conflict.[4] This anomalous interference with state regulation of attorneys further suggests that Congress did not intend the phrase "debt relief agency" to include attorneys.

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[2] These and additional examples are discussed in greater detail below. *See infra* Part II.A.1.

[3] The same problem does not arise with respect to bankruptcy petition preparers who are not subject to the same ethical obligations.

[4] This problem is discussed in greater detail below. *See infra* Part II.A.1.

Likewise, it will often be beneficial for an attorney to advise a client regarding incurring debt "to pay for an attorney." *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-69 (1977) ("rare is the client,...even one of...modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge"). For example, when the client asks the attorney how the client can pay for the attorney's services, if the attorney permits payment over time, the attorney should in straightforward fashion be able to advise the client of that fact. *See id.* (observing that, for ethical reasons, the commercial arrangement between the attorney and client should be fully disclosed). Yet this would constitute "advising" the client to "incur debt" in the form of incurring an obligation to the attorney for the attorney's services and, thus, be proscribed under the statute. This absurd result also suggests that Congress did not intend the phrase "debt relief agency" to include attorneys.[5]

Sixth, including "attorney" within the scope of "debt relief agency" would have the additionally anomalous result of conditioning the quality and comprehensiveness of the attorney's advice

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[5] The same difficulty does not arise in the context of prohibiting non-lawyers from advising individuals about incurring debt to pay an attorney. If anything, it leaves it to the attorney to discuss with the client how the attorney may be paid.

on the client's relative wealth. As noted, the concept of "debt relief agency" is limited to the provision of "bankruptcy assistance" to "assisted persons," and "assisted person" is limited to those of relatively limited means. 11 U.S.C. § 101(3). Thus, debtors (or creditors) with non-exempt property worth in excess of $164,250, and those with primarily business debts, may receive unrestricted advice. This bizarre and highly discriminatory result further suggests that Congress did not intend "debt relief agency" to include attorneys.[6]

Seventh, it is not necessary to include "attorney" within the scope of "debt relief agency" to fulfill the statute's purposes. Although the purposes underlying the "debt relief agency" provisions in the Code are not entirely clear, the Government has argued that the purposes behind these provisions are to "strengthen professionalism" and "prevent abuse." Res. Pet. 3. Of course, as noted, including attorneys within the scope of "debt relief agency" would actually erode professionalism by unduly and inappropriately restricting the advice an attorney may provide to his or her debtor clients. It would also require,

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[6] The same anomalous problem does not arise with respect to bankruptcy petition preparers because they do not provide legal advice. *See* 11 U.S.C. § 110 (e)(2)(A) ("A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice").

in some circumstances, false and misleading advertising. *See Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 767 (1976) (rejecting argument that withholding pricing information from the public was necessary to promote professionalism, and observing that "[a] pharmacist who has a continuous relationship with his customer is in the best position...to exert professional skill for the customer's protection.").

In contrast, *excluding* attorneys from the scope of "debt relief agency" would strengthen professionalism by policing the roles of bankruptcy petition preparers and other non-lawyers who provide services similar to those of bankruptcy petition preparers. As a general matter, bankruptcy petition preparers and other non-lawyers are not qualified or able to provide the kind of legal counsel that bankrupt debtors often need. By tightening restrictions on non-lawyers, the statutory scheme would promote professionalism by encouraging debtors to seek advice from attorneys.

Excluding attorneys from the scope of "debt relief agency" would also help prevent abuse. Again, encouraging debtors to seek advice from attorneys is more likely to result in compliance with the full range of requirements for the successful commencement and completion of cases under the Bankruptcy Code.

The court below stated that reference to another provision of the Code, section 526(d)(2), supports the position that "debt relief agency" includes "attorney." Pet. App. A-26. Section 526(d)(2) is a savings clause, providing that nothing in sections 526, 527, or 528 shall "be deemed to limit or curtail the authority or ability . . . of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State." 11 U.S.C. § 526(d)(2). The court below believed that this provision demonstrates that Congress intended attorneys to be included within the scope of "debt relief agency" because otherwise this provision makes no sense. Pet. App. A-26. On the contrary, the provision makes perfect sense if attorneys are excluded from the scope of "debt relief agency" because section 526(d)(2) is best read as expressly preserving the ability of the States to determine and enforce restrictions on the unauthorized practice of law by bankruptcy petition preparers and other non-lawyers.

The court below also stated that excluding "attorneys" from the scope of "debt relief agency" would be contrary to the intent of Congress. Pet. App. A-27. In support of this analysis, the court pointed to an amendment offered by Senator Feingold during deliberations on the legislation that would have clarified that attorneys are ex-

cluded from the definition of "debt relief agency" in section 101(12A). *See* 151 Cong. Rec. S2180 (daily ed. Mar. 7, 2005). Senator Feingold, however, withdrew the amendment voluntarily before it went to a vote. *See* 151 Cong. Rec. S2463 (daily ed. Mar. 10, 2005). In context, the voluntary withdrawal may be viewed as demonstrating that Senator Feingold came to the ultimate conclusion that the amendment was unnecessary because attorneys already are *not* included within the scope of the provision.

Construed in context, the phrase "debt relief agency" does not unambiguously include attorneys. Further, including attorneys within the scope of this provision generates demonstrably absurd results, is not necessary to fulfill the statute's purposes, would actually defeat the statute's purposes in significant ways, and otherwise would have bizarre and discriminatory effects. The Court should avoid these results by determining that "attorneys" are not included within the scope of "debt relief agency."

B. The Concept of "Debt Relief Agency" Should Be Construed to Exclude Attorneys to Avoid Reaching the Constitutionality of Sections 526 and 528.

Alternatively, even if the Court determines that section 101(12A) is not formally ambiguous, it is nonetheless "fairly possible" to construe the phrase "debt relief agency" as not including attorneys. In this case, the Court should do so to avoid reaching the question of the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B).

As the Court has explained, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). As the Court has also noted, this canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Courts should "not lightly assume that Congress intended to infringe constitutionally protected liberties," and therefore "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

As the Court's precedents further demonstrate, in considering whether it is possible to construe a statute in a way that avoids addressing its constitutionality, relevant canons of construction are properly consulted. For example, in *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982), the Court considered whether it was possible to construe section 522(f) of the Bankruptcy Code to avoid resolving a challenge to its provisions under the Fifth Amendment. Section 522(f) permits a debtor to eliminate certain liens on assets the debtor claims as exempt, and makes no distinction between liens that attach before or after the effective date of the legislation. In *Security Indus. Bank*, a creditor claimed that the statute violated the Fifth Amendment by eradicating liens already in place prior to the statute's enactment. To avoid reaching the constitutional question, the Court invoked the canon that statutes generally apply prospectively rather than retroactively. *Id.* at 79; *see also INS v. St. Cyr*, 533 U.S. 289, 311 (2001) (upholding a district court's jurisdiction to hear an alien's challenge to deportation in spite of a statutory provision stating "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having

committed" the offense that the alien committed, by relying in part on the canon "requiring a clear statement of congressional intent to repeal habeas jurisdiction," thereby avoiding reaching the constitutional issues involved if judicial review were not allowed); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

In this case, numerous canons support the conclusion that the phrase "debt relief agency" does not encompass attorneys, thereby avoiding the constitutional issues decided in the courts below. In addition to the examples discussed above, of particular relevance is the canon that the Court will avoid a construction of the Bankruptcy Code that would seriously interfere with areas of traditional state regulation by requiring that any such intention on the part of Congress be expressed in terms that are "clear and manifest." *BFP*, 511 U.S. at 544 (citation omitted).

In *BFP*, the Court considered whether a trustee in bankruptcy could undo a state-law foreclosure sale under the fraudulent transfer provisions of section 548 of the Code on the ground that the sale had realized a price that was less than the "reasonably equivalent value" of the foreclosed property. In construing the meaning of the phrase "reasonably equivalent value" appearing in the section, the Court explicitly avoided an interpretation that would permit a trustee to undo foreclosure sales conducted in

conformity with state law. The court reasoned that, "[i]t is beyond question that an essential state interest is at issue here," and that if trustees could routinely avoid state law foreclosure sales under section 548, "[t]he title of every piece of realty purchased at foreclosure would be under a federally created cloud." *Id.* at 544. In rejecting this outcome, the Court explained that, "[t]o displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'" *Id.* (citations omitted).

In this case, it is also true that there is an essential state interest at issue. As the Court has long recognized, attorney conduct is an area of traditional state regulation. *See Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) ("[R]egulation of the [Arizona] bar is a sovereign function of the Arizona Supreme Court."); *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."); *Bates*, 433 U.S. at 361; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Moreover, as noted, including attorneys within the scope of "debt relief agencies" trenches seriously on established attorney-client relations, and interferes significantly with state regulation

of attorney conduct.[7] Accordingly, before the Court concludes that attorneys are included within the scope of "debt relief agency," Congress' intent to include them should be "clear and manifest." In context, section 101(12A), which does not even mention the word "attorney," falls well short of this standard.

For all of these reasons, the Court should avoid reaching the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B), by concluding that "debt relief agency" does not include "attorney."

II. If "Debt Relief Agency" Includes Attorneys, Section 526(a)(4) Is Unconstitutional.

A statute is facially overbroad, and therefore invalid under the First Amendment, "if it prohibits a substantial amount of protected speech." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). As the Court has concluded, protected speech includes the provision of private legal advice to a client concerning the client's lawful activities. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-549 (2001). Although in some instances Congress may restrict advice-giving in order to insure the integrity of a message that it

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[7] *See also infra* Part II.A.1 (discussing this interference).

pays for and seeks to disseminate, *Rust v. Sullivan*, 500 U.S. 173 (1991), Congress may not restrict an attorney's private advice regarding a client's lawful activities because doing so impermissibly erodes the fundamental integrity of the attorney-client relationship and the basic freedoms and values that this relationship protects. *Velazquez*, 531 U.S. at 546-49; *see also Virginia State Bd. of Pharm.*, 425 U.S. at 773 (concluding that State may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity" even though the State may be "fearful of that information's effect").

In addition, a statute that imposes a content-based restriction on speech is impermissible under the First Amendment unless, under principles of strict scrutiny, the restriction (1) serves a compelling governmental interest, (2) is narrowly tailored, and (3) is the least restrictive means of advancing the Government's interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994). "'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." *Playboy Entm't Group, Inc.*, 529 U.S. at 817 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). Likewise, "the burden is on the Gov-

ernment to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

Alternatively, where a regulation designed to protect the integrity of the judicial process also imposes a burden on lawyers' speech, the Court may apply a different standard under which the Court first balances the government's legitimate interest in regulating the activity in question against the lawyers' rights, and then determines whether the regulation imposes "only narrow and necessary limitations on lawyers' speech." *Gentile*, 501 U.S. at 1075. In such a case, regardless of whether the Government has an interest in imposing the burden, the regulation is invalid unless it is both narrowly tailored and necessary to the government's legitimate purpose. *Id.*

In this case, section 526(a)(4) is facially overbroad because it proscribes a substantial amount of protected speech. In addition, section 526(a)(4) constitutes an invalid content-based restriction because it fails to satisfy the requirements of strict scrutiny. Alternatively, section 526(a)(4) does not satisfy the requirements of the Court's analysis in *Gentile*.

A. Section 526(a)(4) Is Unconstitutionally Overbroad.

A lawyer's advice to a client concerning a client's lawful conduct is "noncommercial" speech. *Bd. of Trs. of State Univ. v. Fox*, 492 U.S. 469, 482 (1989) (characterizing "legal advice" as noncommercial in nature, as opposed to "commercial speech," which encompasses speech that "*proposes* a commercial transaction"). Accordingly, restrictions on a lawyer's advice are subject to the full range of relevant First Amendment challenges, including the Court's facial overbreadth jurisprudence. *Id.* at 482-83 (observing that, although restrictions on commercial speech are not subject to facial overbreadth analysis, restrictions on noncommercial speech may be invalidated on this basis). Further, because a lawyer's advice is a form of professional speech critical to the functioning of our legal system, it may, under appropriate circumstances, receive "the strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). As the court below properly ruled, "we hold that section 526(a)(4) is substantially overbroad." Pet. App. A-32 n. 10 (citing *Veneklase v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001) (discussing overbreadth doctrine)

(quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (same))).[8]

Under the Court's precedents, a statute is facially overbroad if it sweeps within its proscriptive scope not only conduct that the Government may constitutionally restrict, but also a substantial amount of protected speech that it may not. For example, although a State may enact a prophylactic ban on a lawyer's commercial, in-person solicitation of clients, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), it may not enact a restriction so broad as to encompass in-person, noncommercial solicitation of public interest litigation, *In re Primus*, 436 U.S. 412 (1978). As the Court has explained, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see also Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 475 (2007) ("The Government may not suppress lawful speech as the

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[8] As noted, "protected speech" properly includes the provision of private legal advice to a client concerning the client's lawful activities. *See Velazquez*, 531 U.S. at 546-549. In general, the categories of unprotected speech are relatively few. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (listing examples); *R.A.V. v. St. Paul*, 505 U.S. at 382-83 (discussing traditional areas of unprotected speech); *see also Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) ("The inquiry into the protected status of speech is one of law, not fact.").

means to suppress unlawful speech.") (citations and marks omitted); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L.REV. 1, 29 (2000) (discussing the *Ohralik* and *Primus* decisions).

In this case, section 526(a)(4) both threatens and compels severe and substantial impairment of protected aspects of the attorney-client relationship by restricting an attorney's provision of private advice regarding a client's lawful activities. Notably, section 526(a)(4) does not render it unlawful for a client to actually incur more debt in contemplation of filing a bankruptcy case or to pay an attorney. Rather, the statute prohibits an attorney from *advising* the client to incur more debt in contemplation of bankruptcy or to pay an attorney. Further, the statute prohibits this advice without limiting the kinds of debts subject to the prohibition or the circumstances of their incurrence. Thus, in addition to prohibiting advice to undertake potentially unlawful conduct (e.g., the fraudulent incurrence of debt), Congress has also, in substantial part, prohibited the attorney from advising the client concerning what the client may lawfully do. In other words, the statute requires the client to be kept in the dark regarding "truthful information about entirely lawful activity." *Virginia State Bd. of Pharm.*, 425 U.S. at 773.

In addition, by prohibiting an attorney from "advising" a client to incur more debt in contemplation of bankruptcy or to pay an attorney, the statute also effectively bars the attorney from *talking about* these matters with a client. For example, if an attorney cannot "advise" a client to incur more debt, the attorney also cannot participate in a discussion with the client weighing the pros and cons of a client's pending decision to incur more debt. After all, the whole point of the discussion would be to help the client reach a conclusion, which might well be to incur additional debt before filing a bankruptcy case.

Worse, the language of the prohibition is worded so broadly and vaguely, and is backed by such onerous and ill-defined sanctions, that it must unavoidably chill in substantial measure a lawyer's expression of advice that is not only the lawyer's right and duty to provide, but also the client's right to hear.

As the Court has explained, the First Amendment protects not only the speaker, but also those who would hear the speech – in this case the lawyer's clients and prospective clients. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386-87 (1998) ("Our decisions have concluded that First Amendment protection extends equally to the right to receive information"); *Virginia State Bd. of Pharm.*, 425 U.S. at 756 ("where a speaker exists . . . the protection

afforded is to the communication, to its source and to its recipients both"); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (it is "well established that the Constitution protects the right to receive information and ideas"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (same).

Further, the sanctions associated with violation of section 526(a)(4) are not to be taken lightly: "First Amendment interests are fragile interests," and, as in this case, "a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). Because section 526(a)(4) substantially restricts and chills protected speech, it is facially overbroad.

1. Section 526(a)(4) prohibits and chills a substantial amount of protected speech.

The protections afforded an attorney's advice to a client or prospective client under the First Amendment are properly robust. As the Court has noted, "lawyers are essential to the primary governmental function of administering justice." *Goldfarb*, 421 U.S. at 792. Indeed, no other trade or profession is "as essential" to this critical governmental purpose. *Hoover*, 466 U.S. at 568 n.18 (citations and marks omitted). Not only is the attorney's role necessary to the proper

functioning of the courts, it is also essential to the vindication of individual rights and likewise the public's perception of the integrity of the judicial process as a whole.

If Congress may impair an attorney's function by truncating such things as "complete analysis of the case, full advice to the client, and proper presentation to the court," then "[t]he courts and the public would come to question the adequacy and fairness of professional representations." *Velazquez*, 531 U.S. at 546. This, in turn, would inevitably erode the essential underpinnings of our representational system of advocacy and the basic concepts of justice that it supports. Accordingly, just as Congress may not prohibit an attorney from advising a client that he or she may lawfully challenge an existing statute as illegal or unconstitutional, *id.* at 547-49, Congress may not prohibit an attorney from advising a client about the legality of the client's other activities, such as lawfully incurring debt prior to commencing a bankruptcy case or to pay an attorney.

In its every day application, section 526(a)(4) trenches seriously on the attorney-client relationship and the lawyer's advisory role in very real and practical ways. Clients and prospective clients often approach attorneys with problems that, in their own minds, are frequently ill-defined from a legal perspective. For example, a

client may arrive at an attorney's doorstep armed with a tale of acute financial tragedy, but have no idea what legal recourse may be available to address it, let alone the details of what the client may permissibly do to secure the benefits of any available relief, or avoid its forfeiture. Within our system, the client expects and trusts that the attorney will help define the client's problems legally, and answer the client's legal questions fully. If a client in precarious financial straits inquires, for example, whether it is lawful to borrow money to refinance an existing mortgage to obtain a lower rate of interest prior to filing for bankruptcy, or incur additional debt to purchase a car necessary to get to work, it is unacceptable for the attorney to be prohibited from offering a response other than "I cannot answer your question."

Attorneys are ethically bound to represent their clients competently and diligently, to communicate to a client all necessary information, to assist them in making an informed decision about the legality of a particular course of conduct, and to understand their rights and obligations. *See* Model Rules of Prof'l Conduct R. 1.1 (2009) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in

representing a client."); *id.* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *see also id.* R. 1.4, cmt. 5 ("The guiding principle [regarding the provision of advice to a client] is that a lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests."); *accord* Minnesota Rules of Prof'l Conduct R. 1.1, 1.3, 1.4(b), 2.1; *see also In re Disciplinary Action Against Redburn*, 746 N.W.2d 330, 334 (Minn. 2008) (finding attorney's "lack of communication with all of the clients at issue also violated the requirement of Rule 1.4(b), that an attorney 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'") (citation omitted); *In re Charges of Unprofessional Conduct in Panel Case No. 23236*, 728 N.W.2d 254, 258 (Minn. 2007) ("Rule 1.4(b) states that '[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.' Lawyers comply with Rule 1.4 when they provide their clients with 'sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.'"); *In re Disciplinary Action Against Keate*,

488 N.W.2d 229, 234 (Minn. 1992) (discussing Rule 1.4(b) as an "affirmative duty" to provide the client with necessary information); *see generally Evans v. Jeff D.*, 475 U.S. 717, 728 n.14 (1986) ("Generally speaking, a lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice.").

An attorney cannot comply with these basic principles unless the attorney is free to advise the client regarding his or her options under a particular set of circumstances, or offer advice regarding the legality of a client's proposed course of conduct. Because section 526(a)(4) severely truncates these critical advisory functions, it places the attorney in an unacceptable bind.

As noted, section 526(a)(4) does *not* render unlawful a client's incurrence of additional debt prior to commencing a bankruptcy case or to pay an attorney. Hence, under the ethical rules outlined above, the attorney cannot ethically advise the client that he or she can *never* incur additional debt prior to filing for bankruptcy because that would not be a true statement of the law. At the same time, under section 526(a)(4), the attorney *is* prohibited from advising a client about perfectly legal or beneficial debt options. As a result, the attorney can only remain silent about the subject, which in and of itself violates

the ethical standards listed above. If the client does happen to ask whether he or she can incur debt in a manner that is, in fact, unlawful, the attorney might answer simply "no," but must still refrain from explaining alternative, legitimate financing options (which silence, if anything, might have the perverse effect of encouraging a desperate debtor to pursue a questionable financing option simply for lack of the lawyer's articulation of a legitimate alternative).

The Government has opined that the evil sought to be regulated under section 526(a)(4) is attorney advice involving the incurrence of debt "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge." Pet. App. A-29; *see* Res. 8th Cir. Br., at 29-30. But apart from the fact that these standards are themselves entirely vague, the short answer to the Government's proposition is that they appear nowhere in the statute. By its terms, the statute is not limited to "abusive" conduct. Because the statute sweeps far more broadly than the government suggests, and squarely encompasses perfectly legitimate counsel, it is substantially overbroad.

As the court below properly noted, section 526(a)(4) "prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the

assisted person is contemplating bankruptcy." Pet. App. A-29 (emphasis in original). As the court below also observed, section 526(a)(4) thus sweeps within its scope not only the incurrence of debt for questionable purposes, but those that are entirely beneficial as well. Pet. App. A-30.

Again, section 526(a)(4) provides that "a debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case...or to pay an attorney." 11 U.S.C. § 526(a)(4). This would include, for example, the perfectly legitimate advice that it might be in the debtor's best interests "to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments." Pet. App. A-31; *see also* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) (discussing this example). Advice of this kind is perfectly proper because there is nothing inherently unlawful about such a refinancing, and lowering the client's interest rate may be beneficial not only to the client, but also to his or her creditors: by paying less in interest to one creditor, the client will have more funds to pay the claims of others.

Likewise, section 526(a)(4) would also prohibit the attorney from advising the client "to incur additional debt to purchase a reliable auto-

mobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work." Pet. App. A-31; *see supra* Chemerinsky, at 579. Once again, this advice is perfectly legitimate because there is nothing inherently unlawful about a client borrowing money to purchase reliable transportation. Indeed, it may be entirely beneficial not only to the client, but also to his or her creditors: by having dependable transportation, the client may retain his or her employment, and thus the wages necessary to pay the claims of creditors outside of bankruptcy, or perhaps in bankruptcy under a chapter 13 repayment plan. *See* 11 U.S.C. § 1322(a)(1) (providing that a chapter 13 plan shall "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan."); 8 COLLIER ON BANKRUPTCY ¶ 1322.02[1] (15th ed. 2009) ("Chapter 13 repayment plans are generally, but not necessarily, funded primarily out of future income.").

As a further example, section 526(a)(4) would prohibit an attorney from advising a client to sell a house that the client can no longer afford and move into less expensive quarters, such as a rented apartment, in advance of a potential bankruptcy filing. The attorney is prohibited from offering this advice because doing so would constitute advising the client to incur additional

debt in the form of the rental obligations under the lease, even though this would be beneficial advice. Similarly, a client may need medical attention, but may be concerned whether he or she can afford to pay the doctor's bills because doing so would likely cause the client to default on other obligations that the client might discharge in bankruptcy. Under section 526(a)(4), the attorney is prohibited from advising the client to seek medical care and, if necessary, address the client's other obligations in a bankruptcy proceeding because doing so would constitute advising the client to incur additional debt in the form of the necessary medical expenses. Again, the prohibition applies even though the advice would be beneficial to the client, and might also be beneficial to the client's creditors (who would likely be worse off if the debtor became incapacitated with illness).

Additional examples abound because section 526(a)(4) is not limited to any particular type of "debt," and the concept of "debt" under the Bankruptcy Code is far reaching. Specifically, the term "debt" is defined to mean "liability on a claim," 11 U.S.C. § 101(12), and the term "claim" is defined expansively to mean any "right to payment" regardless of the nature of the right, 11 U.S.C. § 101(5). *See Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) ("a 'claim' is defined...as a 'right to payment,'...and a 'right to payment,' we have said, 'is nothing more nor less than an en-

forceable obligation'") (quoting *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). Thus, the concept of "debt" as used in section 526(a)(4) encompasses virtually every kind of liability, including unpaid taxes, doctors' bills, attorneys' fees, credit card debt, and tort liabilities. *See Davenport*, 495 U.S. at 558 (observing that, under the Code, the term "debt" is coextensive with the term "claim").

Individuals incur "debt" routinely simply by such ordinary acts as consuming utility or medical services for which they subsequently receive a bill; by driving cars covered by mandatory no-fault coverage for which they pay premiums in arrears; or by living in a community that sends bills for property taxes after the taxes have been incurred. Thus, taken to its logical extreme, section 526(a)(4) would effectively prohibit an attorney from answering any of the following questions if posed by a client contemplating bankruptcy: "May I co-sign a student loan for my child's education?"; "May I continue to pay my grocery bills with my credit card?"; "Should I take on a second job?" Because all of these perfectly lawful activities involve incurring debt in one form or another, the attorney cannot answer any of the client's questions, or suggest answers

to these questions as potential solutions to a client's problems.[9]

Similarly, the sweep of section 526(a)(4) is not limited to attorneys who practice bankruptcy law. An individual in financial difficulty seeking advice regarding a personal injury tort claim might approach an attorney who does not specialize in bankruptcy law for advice or representation regarding the claim. The client may wish to pursue the claim in order to pay off his or her debts out of any recovery. As soon as the attorney learns that the client is in financial difficulty and contemplating bankruptcy, however, the attorney would be prohibited from advising the client to hire a personal injury lawyer other than on a pro bono basis because doing so would constitute advising the client to incur additional debt.

In addition, because individuals in financial straits often lack ready cash, it is also often the case that they lack immediate resources to pay

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[9] Of course, the attorney may not know at any particular point whether the client or prospective client actually anticipates filing for bankruptcy. An attorney might inquire at the outset of the relationship, but still might not discover the client's intentions. For example, the client may not have any intention of filing for bankruptcy until *after* learning about the subject fully from the lawyer. *See infra* Part II.A.1 (discussing further the difficulty of applying the "in contemplation of" bankruptcy standard).

for legal services, or for necessary court filing fees. Not surprisingly, individuals may find it necessary to borrow the required funds, whether, for example, from an existing line of credit or a relative, or to agree to pay the attorney over time. Yet, if the client asks the attorney if, for example, it is lawful to borrow the necessary funds from his or her mother to pay the attorney or pay the court, the attorney cannot answer. Likewise the attorney cannot advise the client that he or she may pay the attorneys' fee over time because doing so would be to advise the client to incur debt to pay an attorney (unless the exception set forth in section 101(12A)(C) happens to apply in a chapter 13 case – *see supra* Part I.A.

The impact of section 526(a)(4) on the attorney-client relationship is all the more troubling because, as noted, the section applies only to advice that a "debt relief agency" gives to an "assisted person." By definition, an "assisted person" is someone whose debts consist primarily of consumer debts, and whose nonexempt assets are worth less than $164,250. 11 U.S.C. § 101(3). In other words, "assisted persons" are typically individuals with the least available means. Accordingly, whereas debtors with greater resources may receive completely unrestricted advice, those with lesser means may not. It is difficult to imagine a greater affront to basic concepts of justice than one that curbs beneficial

advice to the least affluent members of society, implicating directly the very values that robust protection of attorney-client advice under the First Amendment are designed to preserve. *See Velazquez*, 531 U.S. at 546; *see also Virginia State Bd. of Pharm.*, 425 U.S. at 763-64 (in concluding that a consumer's right to information regarding prescription drug prices through advertising was "convincing," the Court observed that a ban on this kind of communication "hits...hardest the poor, the sick, and particularly the aged" who are the least able to acquire the beneficial information otherwise).

The chilling effect of section 526(a)(4) also should not be ignored. Section 526(c)(3) empowers "the chief law enforcement officer of a State, or an official or agency designated by a State" to seek injunctive relief barring any violation of section 526, including those that are unintentional, and likewise to pursue an action on behalf of residents of the state to recover damages against anyone who violates the section. 11 U.S.C. § 526(c)(3). In any such action, section 526(c)(3) further authorizes the recovery of costs and attorneys' fees against the violator. In addition, section 526(c)(5) permits a court, on its own motion or on motion by the debtor or the United States trustee, to enjoin a violation of section 526, and to "impose an appropriate civil penalty" against the violator, if the court finds that the person "intentionally violated" section 526, or

engaged in a "clear and conspicuous pattern or practice of violating the section." 11 U.S.C. § 526(c)(5).

As review of these sanctions reveals, they are circumscribed by relatively vague parameters. To begin with, the phrase "appropriate civil penalty" for intentional violations is undefined. In addition, there is no time limit restricting claims based on unintentional violations. As a result, liability could accumulate for years. This is particularly troubling because, in many instances, a lawyer may well have no idea at the time he or she is advising a client to incur debt that this is being done "in contemplation of" bankruptcy. For example, in the situations discussed above in which the client seeks advice regarding a tort claim or a family law matter, the client may, in fact, be contemplating bankruptcy, but the lawyer may be unaware of that intent.[10] Yet section 526 imposes sanctions not only for intentional violations, but also those that are unintentional.

In addition, as a practical matter, it will often be difficult to determine whether a particular

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[10] Notably, section 526(a)(4) does not specify who has to be "contemplating" bankruptcy – the attorney, the client, or both. Historically, the relevant inquiry is the client's intent. *See infra* Part II.A.2 (explaining historic interpretation of the phrase "in contemplation of" in the bankruptcy context).

client or prospective client is, in fact, an "assisted person," thereby triggering application of the proscriptions of section 526(a)(4) in the first place. As noted, an "assisted person" is someone who has primarily consumer debts and who has nonexempt property worth less than $164,250. In order to determine with any degree of precision whether an individual is an "assisted person," an attorney will often require a fair amount of information regarding the person's debts and assets, including a fairly exact valuation of the client's property. Worse, a client's debts, as well as the value of his or her assets, can easily change over time, thereby causing the client to be an "assisted person" at one point, but not another. Accordingly, in order to remain certain whether a client is an assisted person or not (and therefore whether the attorney must comply with section 526(a)(4) or not in advising the client), the attorney would have to periodically update his or her understanding of the client's financial circumstances.

This sort of burden is likely to have unfortunate and serious chilling effects. Because an attorney has an ethical obligation to provide full and complete advice to a client, if the client is *not* an "assisted person," the attorney is obligated to provide beneficial advice that would be prohibited under section 526(a)(4) if the client were an "assisted person." Yet, because it will often be difficult to tell whether a client is, in

fact, an "assisted person," the attorney will feel compelled by the sanctions associated with any violation of section 526(a)(4) to refrain from providing that advice, even though the client may not, in fact, be an "assisted person." Caught in such a dilemma, attorneys may simply respond by declining to provide advice to any person in financial difficulty. *See Smith v. California*, 361 U.S. 147, 152-53 (1960) (where bookseller was liable for inadvertently selling obscene material, the bookseller could be expected to sell only books that it inspected, thereby chilling the selection of books for sale and, hence, information available to the public). At the very least, a person who "contemplates protected activity" under section 526(a)(4) would be "discouraged by the *in terrorem* effect of the statute." *Bates*, 433 U.S. at 380; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (observing that "even minor punishments can chill protected speech"). The provision is thus unconstitutional.

2. A limiting construction of section 526(a)(4) is not warranted.

The Government has itself invoked the canon of avoiding constitutional questions and has argued in favor of construing section 526(a)(4) in a truncated way by restricting its scope to advice to incur debt "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy dis-

charge." Pet. App. A-29; *see* Res. 8th Cir. Br., at 29-30; Government's Cert. Petition, at 15. The government derives this limitation from the fact that section 526(a)(4) prohibits advice to incur debt "in contemplation of" filing a bankruptcy case. The government contends that the phrase "in contemplation of" carries an implied, fixed meaning of "abusive conduct." The government's argument is untenable.

First, there is no sound basis for the government's contention in the text of section 526(a)(4), the context of the Bankruptcy Code as a whole, or the legislative history behind section 526(a)(4). In particular, there is nothing in the text of section 526(a)(4) itself that suggests that the phrase "in contemplation of" means anything other than its common, ordinary meaning, which includes "to have in view as contingent or probable or as an end or intention" without any necessary connotation or implication of abusive intent. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 283 (9th ed. 1983); *see also* AMERICAN HERITAGE COLLEGE DICTIONARY 308 (4th ed. 2004) (defining "contemplation" to mean, among other things, "[i]ntention or expectation" and "contemplate" to mean, among other things, "[t]o have in mind as an intention or possibility"). Moreover, contextual comparison to another section of the Bankruptcy Code that employs the same phrase "in contemplation of" demonstrates

that the phrase cannot bear the weight of the government's interpretation.

Specifically, the same phrase appears in section 329, which provides in relevant part that "[a]ny attorney representing a debtor in a case under this title . . . shall file with the court a statement of the compensation paid or agreed to be paid . . . for services rendered or to be rendered in contemplation of . . . the case." 11 U.S.C. § 329. As used in section 329, the phrase "in contemplation of" does not imply, nor is it limited to, abusive conduct. *See* 3 COLLIER ON BANKRUPTCY ¶ 329.03[1][d] & [e] at 329-9 (15th ed. 2009) (discussing meaning of the phrase "in contemplation of" as used in section 329). Rather, it simply means "with a view to a bankruptcy filing" in the sense that a filing is imminent or likely. Where Congress uses the same language in different parts of the same act, it is presumed to have the same meaning in both places. *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (It is a "normal rule of statutory construction...that 'identical words used in different parts of the same act are intended to have the same meaning.'"). There is no reason to abandon that principle here, particularly since nothing in the legislative history purports to define the phrase "in contemplation of" in the manner the government suggests.

Second, the phrase "in contemplation of" qualifies only part of the prohibition set forth in section 526(a)(4). In particular, section 526(a)(4) prohibits a debt relief agency from advising an assisted person "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney." The phrase "or to pay an attorney" is not limited by the phrase "in contemplation of." Thus, at best, the government's gloss would apply to only part of the section, and would not limit the prohibition of proper advice regarding payments to attorneys.

Third, as an historical matter, the Court has previously interpreted the phrase "in contemplation of" bankruptcy in a manner at odds with the government's construction. Specifically, section 60d of the Bankruptcy Act of 1898, the predecessor to current section 329, authorized a court to reexamine a debtor's payment to an attorney if the payment was, among other things, made "in contemplation of" the filing of a petition commencing a bankruptcy case. 11 U.S.C. § 96d (repealed 1979). In construing the phrase "in contemplation of," the Court reasoned that it meant whether bankruptcy was at least in some sense "the impelling cause of the transaction," in contrast to whether the payment was "wholly separate from any exigency of bankruptcy." *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933); *see also* 3 COLLIER ON BANKRUPTCY ¶ 60.69 at 1147-48 (14th ed. 1977) (analyzing sec-

tion 60d and stating that the term "contemplation" as used in the section meant simply that "the debtor, in making the transfer, is influenced by the imminence of bankruptcy").

On the strength of this interpretation in *Pender*, the Court concluded that the payment to the attorney in that case to engage in "negotiations to prevent bankruptcy" was properly "in contemplation of bankruptcy" even though the attorney's role was to help the debtor *avoid* a bankruptcy filing. 289 U.S. at 479. Obviously, the attorney's activities in *Pender* had nothing to do with abusing the bankruptcy system, and yet the "in contemplation of" phrase was satisfied. In other words, far from supporting the limiting gloss the government suggests, the phrase "in contemplation of" has always meant what one would expect it to mean – namely, conduct with a view to a probable bankruptcy filing and nothing more. As noted, there is no evidence that, in enacting section 526(a)(4), Congress intended the phrase "in contemplation of" to bear anything other than its accepted meaning as used in section 329 and its predecessor, section 60d. Accordingly, it is appropriate to presume that Congress did not intend any meaning other than the historically accepted definition. *See Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure") (cita-

tions and marks omitted); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction").

Fourth, when Congress wishes to restrict the applicability of a provision of the Bankruptcy Code to apply only to abusive or fraudulent conduct, it knows how to do so expressly, and uses words quite different from the phrase "in contemplation of." For example, section 707(b) permits a court to dismiss a chapter 7 bankruptcy case upon a showing that granting bankruptcy relief "would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b). Notably, section 707(b) was amended extensively in 2005, by the same act that added section 526(a)(4) to the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27-35 (2005). If Congress had intended to limit the scope of section 526(a)(4) to "abusive" conduct, it presumably would have used the same terminology that is used in section 707(b). The fact that Congress did not use the same terminology in section 526(a)(4) suggests strongly that it did not intend the same limitation. *See Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion") (citations and marks omitted).

Conversely, when Congress intends to supplement or qualify the phrase "in contemplation of" bankruptcy with some additional element of "abusive conduct," it does so by adding the additional element expressly, and not by relying on some inherent implication of abuse in the phrase "in contemplation of." For example, section 152 of title 18 prescribes criminal penalties for any person who "in contemplation of a case under title 11 . . . knowingly and fraudulently transfers or conceals any of his property." The fact that Congress did not add a similar supplemental restriction in section 526(a)(4) once again suggests strongly that it intended no such restriction to apply. *See FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 302 (2003) ("[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991).

As the Court has noted, it is certainly true that, "[i]n considering a facial challenge, this Court may impose a limiting construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (citing *Virginia Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). But as the Court has hastened to add, that is so only if the particular statute "is 'readily susceptible' to such a con-

struction." *Id.* Where, as here, there is no "text or other source of congressional intent" that identifies "a clear line this Court could draw," a limiting construction is not warranted. *Id.*

Moreover, in this case, applying the limiting construction that the government proposes would simply substitute one constitutional infirmity for another. The government's interpretation – that the phrase "in contemplation of" means "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge" – is itself entirely vague, and therefore constitutionally unsound.

As the Court has explained, the "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 128 S. Ct. at 1845 (2008). Under the doctrine, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.* at 1846. For example, the Court has struck down statutes "that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent' – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning." *Id.*; *see also Coates v.*

City of Cincinnati, 402 U.S. 611, 614 (1971) (striking down a statute as vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all"); *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 598-99, 609 (1967) (striking down statute that made "seditious" utterances or acts grounds for removal, where the definition of "seditious" was unclear and a speaker would not know where the line was drawn between seditious and non-seditious utterances); *Winters v. New York*, 333 U.S. 507, 509 (1948) ("It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment").

In this case, the phrase "in contemplation of" is not defined; it specifies no comprehensible normative standard of conduct; and it lacks the "settled meaning" the Government would ascribe to its language. Moreover, even if the Government's limiting gloss on the phrase were accepted, it, too, fails to satisfy these criteria because the gloss itself offers no reasonably certain means to ascertain the relevant prohibited conduct. Accordingly, applying the construction

that the Government prefers would not save the statute from unconstitutionality. It would simply trade one constitutional problem for another.[11]

B. Alternatively, Section 526(a)(4) Is a Content-Based Restriction that Fails Strict Scrutiny.

As the Court has explained, "Government action that stifles speech on account of its message" contravenes the basic premise of the First Amendment that "each person should decide for himself or herself the ideas and beliefs deserving of expression." *Turner*, 512 U.S. at 641. Among other reasons, restrictions based on the content of the message "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* Because of this danger, and likewise the importance of the values to be protected, "the First Amendment, subject only to

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[11] In the First Amendment context, a statute may be challenged for vagueness on either "facial" or "as-applied" grounds. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 576 (1974). In this case, augmented by the Government's impermissible gloss, section 526(a)(4) would be vague under either standard. The statute would be facially vague because no one could reasonably ascertain what might constitute "abusive" advice. Likewise, petitioners in this case could not reasonably ascertain what might constitute "abusive advice" on an "as-applied" basis.

narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private persons." *Id.* In reviewing controls of this kind, the Court applies "the most exacting scrutiny." *Id.* at 642; *see also Playboy Entm't Group, Inc.*, 529 U.S. at 813.

The "principal inquiry" in determining whether a restriction is "content-based" or "content-neutral" is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner*, 512 U.S. at 641. In general, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* In this case, there is no doubt that section 526(a)(4)'s prohibition against advising a client to incur debt in contemplation of filing a bankruptcy case or to pay an attorney is a content-based restriction.

As noted, section 526(a)(4) does not make it unlawful for a client to incur indebtedness in contemplation of bankruptcy or to pay an attorney. As further noted, the broad sweep of the statute encompasses activities that are not only plainly legitimate, but also beneficial. Moreover, what the statute prohibits is speech *about* the client's potential activities or proposed course of conduct. The statutory restriction is thus prop-

erly "content-based" because it restricts the advice an attorney may give based on the message the attorney conveys.

Further, given that the prohibition set forth in section 526(a)(4) applies only to advice given to persons with relatively limited means, but permits unrestricted advice to everyone else, it is also difficult to understand how section 526(a)(4) serves a governmental interest that is "compelling." The United States argued below that one of the purposes of the restriction is to prohibit attorneys from advising their clients to take on additional debt in order to get around the "means test" that limits the availability of bankruptcy relief. *See* 11 U.S.C. § 707(b) (setting forth the "means test" restricting bankruptcy relief in chapter 7 cases); Res. 8th Cir. Br., at 25-26. Debtors with relatively little means, however, are most likely to satisfy the means test in any event because, in general, the test does not restrict the availability of bankruptcy relief to debtors with below-median incomes. *See* 11 U.S.C. § 707(b)(7) (2005) (providing a safe harbor from dismissal on the basis of means testing where the debtor's current monthly income annualized is below the applicable median family income). Thus, even assuming that the restriction in section 526(a)(4) would have the desired effect the Government recites, it applies only to those least likely to engage in the "abuse" the Government targets.

Moreover, the Government argued below that a second purpose of the restriction is to protect debtors from abusive practices that could lead to a denial of their discharges. Res. 8th Cir. Br., at 37. A debtor who engages in abusive practices may, indeed, be denied a discharge of his or her preexisting debts. *See, e.g.*, 11 U.S.C. §§ 707(b)(3), 727 (2005). But there is no reason to believe that this risk is any greater for debtors with little means than for anyone else. Likewise, there is no reason to believe that attorneys have systematically led debtors generally (let alone the poorest of them) to engage in conduct that has resulted in a denial of their discharges by advising them to incur debt in contemplation of bankruptcy or to pay an attorney. Certainly, as far as our research reveals, review of the reported cases does not indicate that this is even a common problem.

As the Court has explained, its decisions "have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. at 438-39. As the court has also explained, it is "no answer" to say that the purpose of the relevant regulation "was merely to insure high professional standards and not to curtail free expression." *Id.* Here, the Government's arguments fall far short

of satisfying its burden of demonstrating a "compelling" governmental interest. *See also Wisconsin Right to Life, Inc.*, 551 U.S. at 478 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech."); *see generally Free Speech Coalition*, 535 U.S. at 245 (observing that, even the "prospect of crime . . . by itself does not justify laws suppressing protected speech").

In any event, even assuming that section 526(a)(4) serves a compelling governmental interest, it is more than evident that the section is not narrowly tailored to serve that interest. The Government contends generally that the principal evil to which the statutory prohibition is directed is "abusive conduct." Pet. App. A-29. Assuming that is so, Congress easily could have tailored the statute far more narrowly to capture advice about whatever abusive activities it had in mind. Instead, Congress elected to impose a broad, blanket prohibition limited only in the sense that it applies to advice given to a class of persons with relatively little property while leaving unrestricted the advice an attorney may give to everyone else.

The statute also fails to satisfy the "least restrictive means" standard. *See Playboy Entm't Group, Inc.*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's pur-

pose, the legislature must use that alternative" because "[t]o do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit."). Instead of restricting attorney advice regarding the incurrence of debt, Congress easily could have specifically rendered unlawful the actual conduct that it deems to be abusive (whatever that may be), and, as a corollary, required disclosure of the kinds of abusive conduct it has proscribed so that "assisted persons" would be aware of it, as well as any penalties associated with engaging in the proscribed conduct.

There are several ways in which this disclosure could be affected. Before filing for bankruptcy relief, individual debtors are required to undergo debt counseling with a debt counseling service. *See* 11 U.S.C. § 109(h)(1) (2005). A standard form of disclosure regarding proscribed "abusive" conduct could be part of the required materials for this counseling. Alternatively, a standard form of disclosure could be required among the disclosures prescribed in section 528. 11 U.S.C. § 528 (2005).

Alternatively, Congress could have addressed the problem in a different way. Current ethical rules already prohibit attorneys from "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rules of Prof'l Conduct R.

1.2(d) (2009). Likewise, these rules prohibit attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* R. 8.4(c). Similarly, they prohibit "engage[ing] in conduct that is prejudicial to the administration of justice." *Id.* R. 8.4(d); *accord* Minnesota Rules of Profl Conduct R. 1.2(d) (2007). Rather than proscribe attorney speech in the manner set forth in Section 526(a)(4), Congress could have set up a program to enhance enforcement of existing ethical rules as applied in the bankruptcy context. These and other examples demonstrate that section 526(a)(4) is not the least restrictive means of advancing the Government's interest.

Finally, the statute is unconstitutional on either a "facial" or "as-applied" basis. In order to constitute a "facially" invalid content-based restriction, the statute must be unconstitutional in all of its applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (in order to mount a facial challenge, the challenger "must establish that no set of circumstances exists under which the Act would be valid."). In contrast, in an "as-applied" challenge, the statute need be unconstitutional only as applied to the conduct of the challengers. *See, e.g., Goguen*, 415 U.S. at 567-68.

In this case, the statute is facially invalid because, in every instance in which it applies, it ef-

fectively prohibits an attorney from talking fully and candidly *about* the incurrence of debt in contemplation of filing a bankruptcy case or to pay an attorney. Although the Government might have a legitimate interest in prohibiting attorneys from *encouraging* clients to engage in misconduct (if properly framed), that is not what the statute says. It prohibits attorneys from "advising" clients to incur more debt in contemplation of filing a bankruptcy case or to pay an attorney. Included within the scope of "advising" is the function of counseling a client about the legality of any particular debt incurrence idea or option, and the counseling function, at least in its explanatory sense, is never one that the Government has a legitimate interest in truncating in this context.

In any event, the statute is at least invalid on an "as-applied" basis with respect to the activities petitioners routinely engage in. With regard to the petitioner attorneys, this includes providing advice and counsel concerning bankruptcy matters. With respect to the petitioner clients, this includes receiving this advice. As discussed previously, the statute bars all kinds of legitimate and beneficial counsel. Because the statute impermissibly invades both the attorneys' right to provide this advice as well as the clients' right to receive it, the statute is unconstitutional.

C. Section 526(a)(4) Is Invalid Under This Court's Standard in *Gentile*.

In an effort to avoid strict scrutiny, the Government argued below that section 526(a)(4) should be reviewed under the Court's less stringent analysis undertaken in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *See* Res. 8th Cir. Br., at 27. *Gentile* involved a state rule of professional responsibility that prohibited an attorney from making extrajudicial statements to the press that had a substantial likelihood of materially prejudicing a judicial proceeding. *Id.* at 1033. The rule was designed to preserve the fairness of trials, much like other rules governing courtroom proceedings, and did not involve truncating the attorney-client relationship. This case, of course, is quite different, as demonstrated in part by considering the matter from the perspective of the client.

As discussed above, for a client seeking advice from an attorney, the attorney is already barred under applicable state-law rules of professional conduct from counseling the client to engage in abusive conduct. Thus, from the perspective of the client, section 526(a)(4) adds nothing to the applicable regulatory structure, except to prevent the attorney from also providing beneficial advice that the client may want or need to hear. Accordingly, from the client's perspective, section 526(a)(4) cannot serve any legitimate

ethical function not already covered by some other regulation. Thus, in its practical effect, it can only serve as a content-based restriction that suppresses lawful advice. Accordingly, reference to the Court's analysis in *Gentile* is misplaced because Congress has no legitimate need to impose the regulation.

In addition, the regulation at issue in *Gentile* applied only to attorneys. In contrast, section 526(a)(4) applies to any person who provides bankruptcy assistance to an assisted person, including non-lawyers. Because the analysis in *Gentile* is tied to a State's regulation of the activities of lawyers for the sake of preserving fair trials, it has, at best, attenuated relevance to the Government's regulation of the activities of attorneys *and* non-attorneys in a manner that has nothing to do with how a trial is conducted.

Further, *Gentile* involved a collision of constitutional rights. On the one hand, the attorney had a constitutionally protected right to speak. On the other, the litigants had a constitutionally protected right to a fair trial. Because the two interests collided, some mediating rule was required, and the Court applied one by relaxing somewhat the attorney's constitutional right of free expression. Here, of course, there is no such collision. No competing constitutional right weighs in favor of allowing the Government to truncate an attorney's duty to provide full and

complete advice, or a client's right to receive it. Accordingly, the analysis in *Gentile* does not apply.

In any event, even if *Gentile* controls, the Government cannot satisfy its requirements. Regardless of whether section 526(a)(4) protects an important governmental interest, it does not impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075. As discussed above, the restrictions that section 526(a)(4) imposes are neither narrowly tailored, nor necessary to prevent "abusive" advice. Accordingly, section 526(a)(4) cannot pass muster under *Gentile*.

III. If "Debt Relief Agency" Includes Attorneys, Sections 528(a)(4) & (b)(2)(B) Are Unconstitutional.

The First Amendment embraces "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations omitted). As the Court has explained, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* This fundamental concept is critical to the professional lives of attorneys and the role they fulfill within our society and legal system: among other things, attorneys must have sufficient "freedom of mind" to advise

their clients with professional independence, and serve their roles as independent advocates. To fully vindicate this right of "freedom of mind," attorneys cannot be forced either to refrain from providing beneficial advice to their clients about lawful activities, *Velazquez*, 531 U.S. at 546-49, or become the "courier" of some governmentally approved orthodoxy. *See Wooley*, 430 U.S. at 717; *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 790-91, 796-97 (1988) ("The First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it" and that the concept of "freedom of speech" necessarily comprises "the decision of both what to say and what *not* to say"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

One nuanced exception to an attorney's right to be free from governmental compulsion to convey a particular message arises where the attorney engages in commercial speech in the form of advertising his or her services. Although the First Amendment does not permit a State to prohibit all attorney advertising, *Bates*, 433 U.S. at 383 ("advertising by attorneys may not be subjected to blanket suppression"), it does allow a

State some latitude in regulating the content of these advertisements. The State's ability to impose content-based regulations on attorney advertising, however, depends on the context of the advertising in question. As is relevant here, the Court's precedents distinguish two different situations governed by distinct standards of review.

In the first instance, where an attorney elects voluntarily to advertise in a particular way, the State may require the attorney to make certain content-based disclosures in the advertisements to avoid statements that are deceptive or misleading. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651-59 (1985) (State may compel disclosure in attorney's advertizing of certain "purely factual and uncontroversial information about the terms under which his services will be available," including whether, if the representation is undertaken on a contingency-fee basis, the client will be liable for the attorney's "costs" even though the attorney may not charge a "fee" if the matter is unsuccessful).

In contrast, in the absence of deceptive or misleading advertising by the attorney, the State may not force the attorney to adhere to prescribed content-based forms of advertising disclosures. *In re R.M.J.*, 455 U.S. 191, 205 (1982) (where the attorney's advertising was not deceptive or untruthful, State could not require attor-

ney to use certain stock phrases to describe his practice areas); *see also Riley*, 487 U.S. at 795 (stating that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of that speech," and that such compulsions must be viewed as "a content-based regulation of speech").

As the Court has explained, "regulation – and imposition of discipline – are permissible where the *particular advertising* is inherently likely to deceive or where the record indicates that a *particular form or method* of advertising has in fact been deceptive." *In re R.M.J.*, 455 U.S. at 202 (emphasis supplied). In contrast, where the advertising is non-deceptive and truthful, the State's ability to regulate its content is more circumscribed. As the Court has stated, "[a]lthough the potential for deception and confusion is particularly strong in the context of advertising professional services," any "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.* at 203; *see also Riley*, 487 U.S. at 798 (applying "exacting First Amendment scrutiny" to compelled disclosure by professional fundraisers); *Zauderer*, 471 U.S. at 644 (rejecting "prophylactic rule" that was broader than necessary to punish attorney for portion of advertisement that was truthful and not misleading).

As these contrasting precedents demonstrate, the regulation of specific forms of potentially *deceptive* advertisements occupies a fundamentally different sphere from the regulation of truthful, non-deceptive advertising. Although a State may have a strong interest in compelling certain disclosures to ameliorate the former, it generally lacks a legitimate interest in dictating the content of the latter. Thus, it is unsurprising that the Court has articulated a different First Amendment standard governing each of these two very different settings.

To begin with, where an attorney elects to advertise in a particular way (e.g., to advertise that he takes cases on a contingency fee basis and that, if the case is not successful, the client is not obligated to pay any "fees"), and the State concludes that certain disclosures must be made in that *particular type* of advertising to prevent deception (e.g., that the client must also be told whether the client will still be obligated to pay the attorney's "costs" if the matter is unsuccessful), the Court has stated that the State's regulation need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651.

In contrast, where the attorney's advertisements are truthful and non-deceptive (e.g., the attorney states truthfully that he practices in the area of "real estate" law), the Court has held that

the State, in order to impose a regulation that interferes with the content of the advertising message (e.g., requiring the attorney to state that he practices "property" law), "must assert a substantial interest and the interference with speech must be in proportion to the interest served." *In re R.M.J.*, 455 U.S. at 203 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980)). Further, the State's "[r]estrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*

In other words, in order to regulate the content of truthful, non-deceptive advertising, the State must satisfy the requirements of "intermediate scrutiny." *See Florida Bar*, 515 U.S. at 623-24 (stating that, although "the government may freely regulate commercial speech that concerns unlawful activity or is misleading," in contrast "commercial speech that falls into neither of those categories," including truthful, non-deceptive attorney advertising, must satisfy the requirements of "intermediate scrutiny" under *Central Hudson*); *Zauderer*, 471 U.S. at 641-645 (Court reviewed regulation of portion of attorney's advertisement that was truthful and not misleading under *Central Hudson* standard).

With respect to sections 528(a)(4) and 528(b)(2)(B), the proper standard to apply in this

case is intermediate scrutiny under *Central Hudson*. The Government contends that Congress enacted sections 528(a)(4) and 528(b)(2)(B) to address a particular type of advertising that Congress deemed to be deceptive. Specifically, the Government contends that Congress targeted advertising that offers to "wipe out" debts, or make them "disappear," or to "stop credit harassment, foreclosures, or repossessions," where the ad fails to disclose that the means for accomplishing these things is through bankruptcy. *See* Res. 8th Cir. Br., at 42. In this case, however, although petitioner attorneys engage in advertising, they do not engage in the kind of advertising the Government describes. Nevertheless, assuming that attorneys may be "debt relief agencies," section 528 applies to *all* advertisements that an attorney offers to "assisted persons" concerning "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures" and the like, regardless of whether the particular ad in any way resembles the kind of advertising the Government contends Congress deemed to be problematic. In particular, section 528 requires all advertising encompassed within its broad scope to include the following compelled statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. §§ 528(a)(4) & (b)(2)(B).

Under the First Amendment, any compulsion of this kind is unwarranted with respect to peti-

tioners' truthful, non-deceptive advertising that has nothing to do with the kind of advertising the Government claims Congress deemed to be deceptive. *In re R.M.J.*, 455 U.S. at 205; *see also Riley*, 487 U.S. at 800 (rejecting "the prophylactic, imprecise, and unduly burdensome rule the State has adopted" requiring certain disclosures by professional fundraisers to reduce "alleged donor misperception"); *Zauderer*, 471 U.S. at 644 (rejecting broad "prophylactic rule" prohibiting portion of attorney's advertisement where portion had "none of the vices that allegedly justify the rule"). Worse, the specific statement that section 528 directs is itself confusing, inherently misleading, arguably pejorative, and, in some contexts in which it is required to be made, simply untrue.

Applying *Central Hudson* here, sections 528(a)(4) and 528(b)(2)(B) fail to meet its requirements. Although petitioners' advertising constitutes "commercial speech," it is protected because it concerns lawful activity (e.g., offering bankruptcy law services) and is not misleading (i.e., is truthful and not deceptive; and does not offer to "wipe out" debts, or make them "disappear," or "stop credit harassment, foreclosures, or repossessions" without disclosing that the means for accomplishing these things is through bankruptcy). *In re R.M.J.*, 455 U.S. at 203 ("Truthful advertising related to lawful activities is entitled to the protections of the First

Amendment."). In addition, the Government cannot demonstrate a substantial interest in regulating petitioners' truthful and non-deceptive advertising under section 528. Finally, the regulation is not narrowly drawn, but rather sweeps far beyond the scope of the problem the Government articulates, and likewise does not further any substantial interest of the Government.

Alternatively, even if sections 528(a)(4) and 528(b)(2)(B) are analyzed under the more relaxed standard applicable to deceptive advertising, these provisions are still unconstitutional. Section 528 is not "reasonably related to the State's interest in preventing deception of consumers." Apart from straying far beyond the purported problem that gave rise to its enactment, section 528 itself requires confusing and misleading statements. A regulation that requires attorneys to mislead cannot pass muster under any First Amendment benchmark.

Because the court below failed to apply the correct legal standard in this case, and because application of either the *Central Hudson* or *Zauderer* tests demonstrates that sections 528(a)(4) and 528(b)(2)(B) are unconstitutional, its judgment regarding the constitutionality of section 528 must be reversed.

A. Petitioners' Advertising is Truthful and Non-Deceptive; It Is Not of the Kind Congress Deemed to be Misleading; and Sections 528(a)(4) & (b)(2)(B) Require Compelled Disclosures that Are Confusing and Misleading.

The Government argued below that Congress' purpose in enacting section 528 was to remedy a particular, and fairly narrow, problem. Specifically, as noted, the Government contends that some lawyers advertised that they could make a consumer's debts "disappear," or could "wipe out" unpaid bills, or could "stop credit harassment, foreclosures, or repossessions" without mentioning that the method for accomplishing these things was through bankruptcy. *See* Res. 8th Cir. Br., at 42. The Government argues that the failure to mention "bankruptcy" in these ads is deceptive because consumers could be misled into thinking that they could cure their financial problems without filing for bankruptcy, and the Government concludes that Congress enacted section 528 to remedy this deception. *See id.* The Government contends that section 528 is constitutional because it serves this end.

The greatest (but by no means singular) difficulty with the Government's argument is that section 528 is not limited to addressing the problem the Government identifies. Instead of apply-

ing to a particular type of advertising alleged to be deceptive, it sweeps broadly to encompass perfectly truthful, non-deceptive advertising that has none of the vices the Government contends serve as the statute's animating source. This is impermissible. *See Zauderer*, 471 U.S. at 641-645.

By their terms, sections 528(a)(4) and 528(b)(2)(B) compel any person who provides "bankruptcy assistance" to "assisted persons" to identify themselves as a "debt relief agency" in *any* advertisement to the general public – whether potentially deceptive or not – discussing "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures," "eviction proceedings," and the like, and further requires the person to state: "We help people file for bankruptcy relief under the Bankruptcy Code." Critically, section 528 compels this disclosure regardless of (1) whether the compelled statement is truthful in the context in which it is being made; or (2) whether or not the advertisement states that the attorney is offering to "wipe out" a consumer's debts, make them "disappear," "stop credit harassment, foreclosures, repossessions" or the like, without mentioning that the method for accomplishing any of these things is bankruptcy relief. 11 U.S.C. §528(a)(4).

Like many lawyers, petitioner attorneys engage in some advertising of their services. For

example, they maintain a website available to the general public identifying, among other things, the bankruptcy law services they perform. *See* http://www.milavetzlaw.com/Practice Areas/Bankruptcy.asp (discussing the firm's bankruptcy law services). They do not state in their advertisements that they can "wipe out" unpaid bills, make debts "disappear," or "stop credit harassment, foreclosures, or repossessions" without mentioning that these things are accomplished through bankruptcy. Yet, section 528 treats petitioners *as though* they engage in the kind of advertising the Government contends is deceptive. Accordingly, the statute purports to compel them to state in their perfectly truthful and non-deceptive advertising: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

Because their advertisements exhibit none of the vices the Government claims underlie the enactment of sections 528(a)(4) and 528(b)(2)(B), there is no reason petitioner attorneys should be forced to make this statement. This is all the more so with respect to the stock phrase "We help people file for bankruptcy relief under the Bankruptcy Code" because, in their advertisement of bankruptcy services, petitioners already explain what their services encompass, and already specifically mention "bankruptcy" multiple times.

Further, requiring attorneys to call themselves "debt relief agencies" conveys no meaningful information and, at best, is confusing. Among other things, the label begs the unanswerable question: "agency of whom?"

More troubling, the label "debt relief agency" can be viewed as pejorative because forcing the kind of odd self-identification that section 528 requires has the effect of segregating one group of attorneys from the rest. In essence, it is a form of compelled self-branding. Attorneys who advise "assisted persons" about bankruptcy law are entitled to call themselves "attorneys" in their advertising, not something unrecognizable like "debt relief agency."

It is no answer to say that, in addition to calling themselves "debt relief agencies," attorneys may also identify themselves in their advertising as "attorneys." Apart from the fact that attorneys should not be compelled to use any label in the first place other than one of their own choosing that is accurate and not deceptive, *In re R.M.J.*, 455 U.S. at 205, the label "debt relief agency" is also inherently misleading. Without the compulsion of section 528, no person would ever call him- or herself a "debt relief agency," or pay to have such a label disseminated through any advertising medium.

In addition, in the area of commercial advertising, "[t]he listener's interest is substantial." *Bates*, 433 U.S. at 364. Individuals seeking legal advice generally wish to speak with attorneys, not something called a "debt relief agency." It is perfectly conceivable that someone wishing the independent advice of an attorney about such sensitive matters as personal financial difficulty would be put off by the idea of visiting a "debt relief agency." The label adds nothing of benefit for the consumer of legal services, and detracts from the accuracy and clarity of the advertising message. Moreover, because they are inherently confusing and misleading, the disclosures that section 528 directs are inconsistent with applicable ethical rules regulating attorney advertising. *See* Model Rules of Prof'l Conduct R. 7.1 (2007) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."); *accord* Minnesota Rules of Prof'l Conduct R. 7.1 (2007).

The indiscriminate manner in which section 528 compels its disclosures is also fraught with potential to mislead for yet another reason. Petitioner attorneys do not represent debtors exclusively. They provide a range of legal services to a variety of clients, including creditors. Joint

App. 60a. Yet, if they engage in any advertising of any particular services to *creditors*, and include in that advertising any reference that these services involve "mortgage foreclosures" or "eviction proceedings," section 528(b)(2)(B) directs that petitioners must still state "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(b)(2)(B). Where the advertisement is directed to creditors, this kind of disclosure makes no sense.

Similarly, if petitioner attorneys were to advertise that they represent homeowners in foreclosure proceedings wholly apart from bankruptcy, they would still have to include the compelled statement in their advertisement even though the advertisement truthfully would have nothing to do with bankruptcy and would involve only defending state law foreclosure suits. This result also makes no sense, and section 528(b)(2)(B) is inherently misleading in this context.

B. Sections 528(a)(4) and 528(b)(2)(B) Cannot Satisfy The Requirements of Intermediate Scrutiny under *Central Hudson*.

Under *Central Hudson*, in order to regulate truthful, non-deceptive attorney advertising, the Government "must assert a substantial interest

in support of its regulation." *Florida Bar*, 515 U.S. at 624; *see also Zauderer*, 471 U.S. 641. In addition, the Government "must demonstrate that the restriction on commercial speech directly and materially advances that interest." *Florida Bar*, 515 U.S. at 624. Finally, "the regulation must be narrowly drawn." *Id.* (citation and marks omitted). The Government cannot meet these requirements.

1. The Government Lacks a Substantial Interest in Regulating Petitioners' Advertising.

When the Court applies intermediate scrutiny, it will not "supplant the precise interest put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Here, the Government postulates a single reason behind section 528 – to regulate the particular form of advertising discussed above to prevent consumers from being deceived into believing that an attorney could make their debts "disappear" and the like without filing for bankruptcy. This interest, of course, is entirely irrelevant because petitioner attorneys do not engage in the kind of advertising the Government describes, yet are subject to regulation under section 528.

Further, the only "evidence" the Government has cited in support of its contention that anyone has actually been deceived by the kind of adver-

tising discussed above is that "one retailer testified that some of his customers, who were misled by such lawyer advertisements, 'did not even understand that they had filed for bankruptcy.'" Res. 8th Cir. Br., at 42. Although the Government may have an interest in preventing deception of this limited magnitude, its interest, based on this meager testimony, is not demonstrably "substantial."

The Government also cites a Federal Trade Commission consumer alert warning that debt-relief ads proposing to "wipe out" consumer debts and the like often failed to disclose that the method for accomplishing this was through bankruptcy. *Id.* The alert does not actually demonstrate that any consumer has been, in fact, deceived by this advertising in the manner the Government contends. The Government's interest is not substantial. Even if it were, the Government cannot satisfy the other requirements of *Central Hudson*.

2. The Government Cannot Demonstrate that Its Regulation Directly and Materially Advances Its Interest.

In order to satisfy the second prong of the *Central Hudson* standard, the Government must demonstrate that the regulation at issue "advances the Government's interest in 'a direct and material way.'" *Rubin v. Coors Brewing Co.*, 514

U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 767)). The Government's burden "is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770. Rather, in order to sustain the restriction, the Government must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771; *see also Florida Bar*, 515 U.S. at 625-26.

In *Florida Bar*, the evidence of the harm supporting the State's purported interest in restricting attorney solicitations to the victims of accidents for a thirty day period following the accident included unrefuted statistical analysis, surveys, and an "anecdotal record" that the Court described as "noteworthy for its breadth and detail." *Florida Bar*, 515 U.S. at 627. Even so, a bare majority of the Court found it sufficient to satisfy the second element of *Central Hudson*.

In contrast, in *Edenfield*, the evidence of the harm supporting the State's purported interest was slim, at best. Lacking sufficient evidence, the Court invalidated the restriction. In this case, the evidence of the harm the Government offers in support of upholding section 528's compelled disclosures is almost as slim, and certainly well shy of the barely sufficient mark in *Florida Bar*.

Moreover, the Government has failed to demonstrate that the compelled disclosures required by section 528 has or can alleviate the harm it identifies. This is especially difficult given that the compelled disclosures are themselves confusing and inherently misleading. The Government has failed to satisfy its burden.

3. Section 528 Is Not Narrowly Drawn.

The Government also cannot satisfy the last element of the *Central Hudson* standard. As discussed above, section 528 is not narrowly tailored to address the particular harm the Government identifies. On the contrary, it is framed in exceptionally broad terms, and encompasses not only any allegedly deceptive advertising, but also advertising that is truthful and not misleading.

The Government points to a specific type of advertising that it contends Congress determined was deceptive. The legislature could have readily drawn a far narrower statute targeting that specific kind of advertising. Congress, however, did not do so, and section 528 fails the third element of *Central Hudson*.

C. Alternatively, Sections 528(a)(4) and 528(b)(2)(B) Cannot Satisfy the More Relaxed Requirements Applicable to Deceptive Advertising.

Finally, even under the approach the Court applied in *Zauderer* to the portion of the attorney's advertisement in that case that was deceptive, section 528 does not pass constitutional muster. With respect to misleading advertising, the Court determined that a State's regulation need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Sections 528(a)(4) and 528(b)(2)(B) do not satisfy even this relaxed standard for two basic reasons.

First, the sections are not "reasonably related" to the Government's interest in preventing the deception it identifies because the sections impose an undue burden vastly disproportionate to the harm they seek to mitigate. Second, the sections are not "reasonably related" to the Government's interest because they compel confusion and deception. A regulation that requires attorneys to mislead cannot pass muster under any First Amendment benchmark. In sum, there is nothing reasonable about the provisions.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below concluding that attorneys are debt relief agencies. Alternatively, the Court should affirm the decision below that section 526 is unconstitutional, and reverse the determination below that section 528 is constitutional.

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STATUTORY APPENDIX

STATUTORY APPENDIX

11 U.S.C. § 101. Definitions

In this title the following definitions shall apply:

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) The term "claim" means--

> **(A)** right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include--

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such as-

sisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

11 U.S.C. § 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section--

> **(1)** "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing; and
>
> **(2)** "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

.....

(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

> **(2)(A)** A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

.....

11 U.S.C. § 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 526. Restrictions on debt relief agencies

(a) A debt relief agency shall not--

> **(1)** fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;
>
> **(2)** make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;
>
> **(3)** misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to--
>
> > **(A)** the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that

such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bank-ruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has

violated or is violating this section, the State--

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and

consistent pattern or practice of violating this section, the court may--

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall--

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability--

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

11 U.S.C. § 527. Disclosures

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide--

> **(1)** the written notice required under section 342(b)(1); and
>
> **(2)** to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that--
>
> > **(A)** all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;
> >
> > **(B)** all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

> **(C)** current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after rea-sonable inquiry; and
>
> **(D)** information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You

will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.".

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--

> **(1)** how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;
>
> **(2)** how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

11 U.S.C. § 528. Requirements for debt relief agencies

(a) A debt relief agency shall--

> **(1)** not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--
>
> > **(A)** the services such agency will provide to such assisted person; and
> >
> > **(B)** the fees or charges for such services, and the terms of payment;
>
> **(2)** provide the assisted person with a copy of the fully executed and completed contract;
>
> **(3)** clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are

with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b)(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes--

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall--

> **(A)** disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and
>
> **(B)** include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

RESPONDENT'S BRIEF

Nos. 08-1119 and 08-1225

In the Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, Congress enacted regulations governing the professional conduct of any "debt relief agency," a term that Congress defined to include "any person who provides any bankruptcy assistance" to a consumer debtor for valuable consideration, with enumerated exceptions. 11 U.S.C. 101(12A). Section 526(a)(4) of Title 11 provides that a "debt relief agency" may not advise a debtor "to incur more debt in contemplation of" filing a bankruptcy petition. Section 528 of Title 11 requires "debt relief agencies" to include certain disclosures in advertisements to the public of bankruptcy-related services. The questions presented are as follows:

1. Whether an attorney who provides bankruptcy assistance to a consumer debtor in return for valuable consideration, and who does not fall within one of the listed exceptions, is a "debt relief agency" under the Bankruptcy Code.

2. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.

3. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

4. Whether the advertising-disclosure requirements of Section 528 violate the First Amendment.

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 541 F.3d 785.[1] The opinion of the district court denying the government's motion to dismiss (Pet. App. 29a-44a) is reported at 355 B.R. 758.

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the government's petition in No. 08-1225.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 5, 2008 (Pet. App. 47a). The petition for a writ of certiorari in No. 08-1119 was filed on March 5, 2009. On February 20, 2009, Justice Alito extended the government's time within which to file a petition for a writ of certiorari to and including April 6, 2009, and the petition in No. 08-1225 was filed on April 3, 2009. The petitions for writs of certiorari were granted on June 8, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech." The pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

This case involves a pre-enforcement challenge under the First Amendment to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or 2005 Act), Pub. L. No. 109-8, 119 Stat. 23. The 2005 Act established certain minimum standards of professional conduct for "debt relief agencies." The district court held that two of those provisions violate the First Amendment and that the statutory term "debt relief agency" does not encompass licensed attorneys. Pet. App. 29a-44a.

The court of appeals reversed in part. The court held that attorneys may be "debt relief agencies" under the

2005 Act, and it upheld the statute's advertising-disclosure requirements. Pet. App. 3a-10a, 15a-21a. By a divided vote, however, the court held that the statutory provision restricting debt relief agencies from advising their clients to take on new debt "in contemplation of" bankruptcy violates the First Amendment. *Id.* at 10a-15a; see *id.* at 22a-28a (Colloton, J., concurring in part and dissenting in part).

1. The 2005 Act was "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*House Report*). Described by the House Committee as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," *id.* at 3, the 2005 Act both modified the substantive standards for bankruptcy relief and adopted new measures intended to curb a variety of abusive practices that Congress concluded had come to pervade the bankruptcy system.

After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions and had sometimes jeopardized debtors' ability to obtain a discharge of their debts. For example, Congress heard evidence that a civil enforcement initiative undertaken by the United States Trustee Program had "consistently identified * * * misconduct by attorneys and other professionals" as among the sources of abuse in the bankruptcy system. *House Report* 5 (citation omitted). Congress responded to that evidence by "strengthening professionalism standards for attorneys and others who

assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The 2005 Act added or enhanced a variety of regulations on bankruptcy professionals' conduct. Those regulations are intended to protect the clients and prospective clients of bankruptcy professionals, the creditors of clients who do enter bankruptcy, and the bankruptcy system. The regulations require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system. See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D).

Many of the regulations apply to "debt relief agenc[ies]" generally. Under the Bankruptcy Code's definition, "any person" becomes a debt relief agency by providing "any bankruptcy assistance" for a fee to a consumer debtor, known as an "assisted person."[2] 11 U.S.C. 101(12A). "Bankruptcy assistance" includes, inter alia, "advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. 101(4A).[3]

Section 526 of Title 11 sets out four basic rules of professional conduct for debt relief agencies, each of which protects clients against specific unethical prac-

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[2] An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than" an inflation-adjusted sum, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

[3] The 2005 Act establishes five specific exceptions to the definition of "debt relief agency" for in-house preparers, tax-exempt nonprofits, creditors, banks, and copyright owners. 11 U.S.C. 101(12A)(A)-(E).

tices. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising assisted persons to make statements that are untrue or misleading in seeking bankruptcy relief. Section 526(a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the benefits and risks attendant to filing for bankruptcy. And Section 526(a)(4), the provision held unconstitutional below, states:

> A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. 526(a)(4).

Section 528 includes several disclosure requirements that apply when a debt relief agency advertises its services to the general public. First, advertisements that promote either "bankruptcy assistance services" or "the benefits of bankruptcy" must make clear that the services or benefits "are with respect to bankruptcy relief under [the Bankruptcy Code]." 11 U.S.C. 528(a)(3); see 11 U.S.C. 528(b)(1) (defining what advertisements are covered). Second, advertisements that promote "assistance with respect to" certain consumer debt or credit problems must disclose that the assistance "may involve" filing for bankruptcy relief. 11 U.S.C. 528(b)(2)(A). Third, advertisements in either of these two categories must also include either a specified disclaimer—"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy

Code."—"or a substantially similar statement." 11 U.S.C. 528(a)(4) and (b)(2)(B).[4]

The principal remedy for violations of Sections 526 and 528 is a civil action by the debtor to recover his "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). For violations of Section 526, the statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). For intentional or recurring violations of that provision, the bankruptcy court may also impose an injunction or "an appropriate civil penalty," either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Petitioners are a law firm, two of the firm's attorneys, and two prospective clients. J.A. 37a-38a. They filed this action against the United States, seeking a declaratory judgment that the attorney respondents are not obligated to comply with several of the BAPCPA's provisions regulating debt relief agencies' professional conduct, including Section 526(a)(4) and the advertising-disclosure provisions of Section 528. Petitioners contended that licensed attorneys are not "debt relief agenc[ies]" within the meaning of the statute, even if they provide bankruptcy-related advice to debtors. They also argued that, to the extent the statute encompasses licensed attorneys, the challenged provisions violate the First Amendment. Pet. App. 2a.

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[4] Section 528 also requires disclosure to an "assisted person" once a debt relief agency begins to provide that person with "bankruptcy assistance services." The debt relief agency must execute a written contract with the client that explains what services the debt relief agency will provide and what fees the client will have to pay. 11 U.S.C. 528(a)(1) and (2).

The district court denied the government's motion to dismiss, Pet. App. 29a-44a, and then granted summary judgment for petitioners, *id.* at 45a. The district court held that Section 526(a)(4) and the advertising-disclosure requirements of Section 528 violate the First Amendment. *Id.* at 33a-41a. The court further held, apparently in the alternative, that attorneys do not fall within the statutory definition of "debt relief agency." *Id.* at 41a-43a.

3. The government appealed, contending that attorneys unambiguously fall within the definition of "debt relief agency" and that the district court's constitutional holdings were premised on a misreading of the statute. In particular, the government explained that the phrase "in contemplation of" bankruptcy in Section 526(a)(4) has a long historical pedigree in bankruptcy law: in this context, the phrase is properly construed to forbid only advice encouraging a client to take on new debt on the eve of bankruptcy with the intent of abusing the bankruptcy system. The government further contended that, to the extent the term "in contemplation of" is ambiguous, the doctrine of constitutional avoidance supports the government's narrow reading of the term, which avoids the overbreadth that the district court perceived.

4. The court of appeals affirmed in part and reversed in part. The court unanimously held that attorneys may fall within the definition of "debt relief agency," and it reversed the district court's invalidation of the advertising disclosure requirements in Section 528. The court held by a divided vote, however, that Section 526(a)(4) as applied to attorneys violates the First Amendment. See Pet. App. 1a-28a.

a. The court of appeals first concluded that attorneys for consumer debtors may fall within the definition of "debt relief agency." Pet. App. 3a-10a. The court noted that Congress had specifically defined both "debt relief agency" and several terms used in the definition of "debt relief agency." *Id.* at 4a-5a. Those definitions "sweep[] broadly," the court concluded, "and clearly cover[] the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision." *Id.* at 9a. The court noted that Congress had adopted five specific exceptions to the definition of "debt relief agency," none of which covered petitioners. *Ibid.* The court of appeals also concluded that constitutional-avoidance considerations could not justify petitioners' reading of the term "debt relief agency" because that reading was foreclosed by the statute's plain language. *Id.* at 8a.

b. The court of appeals rejected petitioners' constitutional challenge to Section 528's disclaimer requirements. Pet. App. 15a-21a. The court concluded that, because Section 528 regulates potentially misleading commercial advertising by imposing disclosure requirements, it is not subject to any of the forms of heightened scrutiny that apply to restrictions on commercial speech. *Id.* at 18a (citing *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 n.14 (1985)). Applying the *Zauderer* standard, the court held that Section 528 is "directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy." *Id.* at 19a. The court noted that the statements contained in the required disclaimer are "factually correct" because attorneys subject to the require-

ment are "debt relief agenc[ies]" as the Code uses that term. *Id.* at 20a. The court of appeals also observed that, because the statute permits the substitution of a "substantially similar" disclaimer, any attorney who does not actually assist with bankruptcy filings can "tailor" the disclosure statement to assuage any concern about its accuracy. *Id.* at 20a n.12.

c. The court of appeals further held, over Judge Colloton's dissent, that Section 526(a)(4) violates the First Amendment. Pet. App. 10a-15a; see *id.* at 22a-28a (Colloton, J., concurring in part and dissenting in part). The court rejected the government's proposed narrowing construction of the statute. The court concluded that, under what the majority described as the only permissible interpretation of the statute's "plain language," Section 526(a)(4) prohibits debt relief agencies from advising consumer clients "to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Id.* at 12a. The court stated that "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws." *Id.* at 13a.

Based on that broad construction, the court of appeals held that Section 526(a)(4) is unconstitutionally overbroad. Pet. App. 12a-15a. The court explained that advice to take on new debt just before bankruptcy will sometimes be legitimate. As examples, the court observed that "it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments," or to purchase a car to ensure "dependable transportation * * * to and from work." *Id.* at 13a-14a. The court further posited that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. The

court concluded that the First Amendment prohibits regulation of such legitimate advice and that Section 526(a)(4) is therefore "unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons." *Id.* at 15a.[5]

d. Judge Colloton dissented in relevant part. Pet. App. 22a-28a. He explained that, in his view, "[t]he text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction," under which "the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system." *Id.* at 25a. Judge Colloton concluded that Section 526(a)(4), so construed, is constitutional. See *id.* at 22a, 25a, 28a.

First, Judge Colloton observed that the phrase "in contemplation of bankruptcy" is a term with a long history and "has been construed * * * to mean actions taken with the intent to abuse the protections of the bankruptcy system." Pet. App. 25a; see *id.* at 25a-26a (collecting authorities). Second, Judge Colloton pointed out that the remedies for a violation of Section 526(a)(4) "emphasize actual damages," and he reasoned that a debtor who follows his attorney's bankruptcy advice is

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[5] The court of appeals did not identify the precise constitutional standard under which petitioners' challenge should be evaluated. Petitioners had argued that strict scrutiny should apply, while the government had contended that Section 526(a)(4) is a reasonable regulation of attorneys' professional conduct that is to be reviewed more deferentially under the standard announced in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). The court acknowledged that the government had a "legitimate interest" in prohibiting advice that would assist debtors in abusing the bankruptcy system. Pet. App. 12a. But the court held that, on its reading of Section 526(a)(4), the statute was insufficiently connected to that interest and therefore was unconstitutional under either strict scrutiny or the *Gentile* standard. *Id.* at 12a-13a.

unlikely to be harmed as a result unless he is induced to file "an abusive bankruptcy petition, where the debtor may suffer damages if the petition is dismissed as abusive." *Id.* at 27a (citing 11 U.S.C. 707(b)(1)). Third, he identified legislative history reflecting Congress's desire to address "abusive" practices by bankruptcy professionals and by debtors who "knowingly load up" on debt before filing for bankruptcy. *Id.* at 27a-28a (quoting *House Report* 5, 15). Judge Colloton concluded: "Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that [petitioners] say[] is absurd, that the [government] says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." *Id.* at 28a.

5. The court of appeals denied the government's petition for rehearing en banc by a vote of 6-5. See Pet. App. 47a.

SUMMARY OF ARGUMENT

I. Attorneys are not exempt from the definition of "debt relief agency" under the Bankruptcy Code. The definition encompasses "any person" who provides specified services to specified clients, subject to five specific exceptions. None of those exceptions includes attorneys, either expressly or by implication. 11 U.S.C. 101(12A). Attorneys therefore are debt relief agencies if they provide the specified clients with the specified services, known as "bankruptcy assistance." *Ibid.* Indeed, "bankruptcy assistance" is expressly defined to include certain services that can *only* be performed by lawyers, such as providing "legal representation" or

"appearing in a [bankruptcy] case" on behalf of a consumer debtor. 11 U.S.C. 101(4A). That language would be surplusage if attorneys were categorically ineligible to be debt relief agencies. And the legislative history confirms that Congress was targeting abusive conduct *by attorneys* in bankruptcy cases.

Petitioners contend, on various theories, that their reading must prevail in the absence of an express reference to "attorneys" in the statute. But the statute's application to attorneys is clear. In light of the broad statutory definition of "debt relief agency" and the unmistakable inclusion of legal services within the scope of "bankruptcy assistance," the absence of the term "attorney" from the definitions is immaterial. When a person provides the services specified, he falls within the coverage of the statute, regardless of whether he possesses a law license. Nor, contrary to petitioners' arguments, does this natural reading of the statute create any absurd results.

In any event, there is no reason to adopt a clear statement rule, as petitioners suggest, in interpreting the term "debt relief agency." Congress's regulation of debt relief agencies does not infringe on any traditional power of the States; federal laws, agencies, and courts (including this Court) have long regulated the conduct of attorneys and other professionals within federal spheres of interest, such as bankruptcy. And the doctrine of constitutional avoidance provides no reason to adopt petitioners' proposed construction of the statute. That construction itself would not fully cure the constitutional problem petitioners perceive, and it would exempt attorneys from a variety of client-protection measures to which there is *no* constitutional objection. The Court therefore should reject petitioners' proposed in-

terpretation even if it finds that the statute does not plainly cover lawyers.

II. Section 526(a)(4) is not unconstitutionally overbroad. The court of appeals' decision to the contrary rested on its view that the statute prohibits advice "to incur any additional debt when the assisted person is contemplating bankruptcy." Pet. App. 12a (emphasis omitted). But the statute does not use the temporal term "when" at all; rather, it uses the phrase "in contemplation of [bankruptcy]," a phrase that has long been read to incorporate an element of intent to abuse the bankruptcy laws. Read in accordance with that long history, Section 526(a)(4) prohibits only advice to take on debt with an intent to abuse the bankruptcy laws, such as advice to charge a vacation, concert tickets, or some similar purchase to a credit card, knowing that the purchaser will enjoy the full benefit of the purchase and then shed most or all of the debt in bankruptcy.

The structure and legislative history of the statute confirm that Congress regulated only *abusive* bankruptcy advice. The problem that Congress sought to combat was the phenomenon of "loading up" on debt with the intent of gaining relief through bankruptcy. That purpose is manifest in the other provisions Congress adopted to limit eligibility for a complete discharge under Chapter 7 of the Bankruptcy Code; indeed, those provisions create incentives to take on more debt to affect the eligibility determination. Section 526(a)(4) is properly read as a reasonable and targeted way of combating those incentives. Surrounding provisions of the statute, which specify other rules of professional conduct and provide remedies for clients injured by the unethical advice, confirm the correctness of this reading.

The court of appeals rejected this construction in a single terse reference to the "plain language" of the statute. Pet. App. 12a. Petitioners likewise insist that Section 526(a)(4) should be read more broadly—unconstitutionally broadly. But petitioners must establish not only that their reading of Section 526(a)(4) is the better one (which they cannot), but that it is the *only* plausible one. In light of the long history of the key phrase that Congress used and the history and structure of the statute, petitioners cannot rebut "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *E.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (citation omitted).

Adopting the correct interpretation of Section 526(a)(4) eliminates the overbreadth that the court of appeals perceived. By narrowly prohibiting attorneys from advising clients to commit acts that are criminal, fraudulent, or (at a minimum) abusive of the federal judicial system, Section 526(a)(4) parallels a long-accepted principle of legal ethics that has been enshrined in state law for decades. This Court has established that attorneys in judicial proceedings may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile* v. *State Bar*, 501 U.S. 1030, 1071 (1991). Attorneys representing clients at the bar of a federal bankruptcy court owe a professional obligation to the tribunal not to counsel their clients to take action that directly subverts the bankruptcy system. The First Amendment does not excuse attorneys from that obligation, nor does it prevent Congress from providing federally enforceable remedies for clients harmed by their attorneys' breach of that obligation.

III. The court of appeals correctly upheld the advertising-disclosure requirements of Section 528. Disclosure requirements applied to commercial speech receive more deferential scrutiny than do restrictions on the content of commercial advertising. As this Court has squarely held, a requirement that attorney advertising include specified factual disclosures need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985). Petitioners' reliance on cases involving forced political speech and outright restrictions on truthful commercial speech therefore is unavailing: *Zauderer* sets out the controlling standard here.

The advertising-disclosure requirements readily satisfy that standard. Congress documented the problem it sought to combat: misleading attorney advertisements that offered to provide relief from debt, a halt to foreclosure, and the like, without adequately disclosing that obtaining these forms of relief requires filing for bankruptcy and suffering the attendant consequences. Congress was entitled to determine that such advertisements are misleading unless they properly disclose that the benefits touted entail a bankruptcy filing.

Petitioners contend that the two-sentence disclaimer specified in the statute is misleading and, therefore, unconstitutional. But petitioners principally object to including the phrase "debt relief agency," a statutorily defined term whose natural *and* legal meanings encompass consumer bankruptcy attorneys. Requiring debt relief agencies to identify themselves as such is entirely accurate and proper. Petitioners may well desire to call themselves "attorneys" in their advertising, but nothing in Section 528 precludes them from doing so, or from

providing any additional information they wish. Indeed, Congress also specified that debt relief agencies may vary the text of the prescribed disclosure and use any "substantially similar statement." 11 U.S.C. 528(a)(4) and (b)(2)(B). Accordingly, Section 528 is constitutional on its face.

Petitioners also argue, for the first time in this litigation, that *their* advertising is not misleading and does not require any disclaimer. But petitioners' past advertisements are not in the record, nor are their plans for future advertising. This late-raised as-applied challenge therefore provides no basis to disturb the judgment of the court of appeals.

ARGUMENT

I. THE BAPCPA'S "DEBT RELIEF AGENCY" PROVISIONS ENCOMPASS ATTORNEYS AS WELL AS OTHER BANKRUPTCY PROFESSIONALS

Petitioners contend (Br. 12-35) that the BAPCPA's "debt relief agency" regulations do not apply to licensed attorneys. As the court of appeals recognized, that argument is foreclosed by the plain language of the statute. Pet. App. 3a-10a; accord *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 749-752 (5th Cir. 2008) (same), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009).

A. Attorneys Who Provide "Legal Representation" Or Other "Bankruptcy Assistance" To Consumer Debtors Are "Debt Relief Agencies"

1. Attorneys who provide paid legal representation to consumer debtors in bankruptcy proceedings are "debt relief agencies" under a straightforward reading of the pertinent statutory definitions. See *Burgess* v.

United States, 128 S. Ct. 1572, 1577 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (quoting *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Subject to five enumerated exceptions that make no reference to attorneys, Congress defined the term "debt relief agency" to include "any person" who, for a fee, "provides any bankruptcy assistance to an assisted person." 11 U.S.C. 101(12A). "Assisted person[s]" include consumer debtors. 11 U.S.C. 101(4A); see note 2, *supra*. "Bankruptcy assistance" means:

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, *advice*, *counsel*, document preparation, or filing, or attendance at a creditors' meeting or *appearing in a case or proceeding on behalf of another* or *providing legal representation* with respect to a case or proceeding under this title.

11 U.S.C. 101(4A) (emphases added). The term "debt relief agency" thus encompasses "any person" who "advi[ses]," "counsel[s]," "appear[s] in a [bankruptcy] case or proceeding on behalf of," or provides "legal representation with respect to a [bankruptcy] case" to, a consumer debtor in exchange for a fee.

Bankruptcy attorneys fall within that definition when they perform one or more of the specified services for the specified type of client. "[A]ny person" is a capacious term that encompasses any attorney. See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 832 (2008) ("any" is naturally read to have an expansive meaning); 11 U.S.C. 101(41) (broad definition of "person"). And the services defined as bankruptcy assistance are often

provided by lawyers. Indeed, because *only* attorneys can provide "legal representation" or "appear[] in a [bankruptcy] case" on behalf of a consumer debtor, see, *e.g.*, 11 U.S.C. 110(e)(2)(A) (bankruptcy petition preparers may not provide legal advice), petitioners' reading of the term "debt relief agency" would render those aspects of the statutory definition superfluous.[6] That alone is a sufficient reason to reject petitioners' construction. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998).

In light of those unambiguous textual indicia, the absence of the word "attorney" from the definition of "debt relief agency" is immaterial. A debt relief agency is defined by the services it performs and the clients for whom it performs them, and "any person" who performs those services may qualify. See 11 U.S.C. 101(4A) and (12A), 110(a). Analogously, the Fair Debt Collection Practices Act does not specifically refer to lawyers or the practice of law, but it defines a "debt collector" as "any person" who engages in the debt collection busi-

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[6] One amicus brief suggests that the phrase "legal representation" refers to the "unauthorized practice of law" by non-attorneys such as bankruptcy petition preparers. NACBA Br. 34. That is an unnatural reading: a person becomes a "debt relief agency" by providing "legal representation" (or other "bankruptcy assistance") only if he is not already a debt relief agency by virtue of being a bankruptcy petition preparer. See 11 U.S.C. 101(12A). Thus, the reference to "legal representation" (or other "bankruptcy assistance") is relevant only to persons other than bankruptcy petition preparers, such as attorneys. See 11 U.S.C. 110(a)(1) (attorneys are not bankruptcy petition preparers). Moreover, bankruptcy petition preparers are already prohibited from offering "legal advice" or signing documents on behalf of any debtor; those prohibitions, and the bankruptcy court's authority to enforce them, are altogether separate from the "debt relief agency" provisions. See 11 U.S.C. 110(e)(2), (i), (j) and (k).

ness, 15 U.S.C. 1692a(6), and this Court has held that attorneys are debt collectors "whenever they meet the general 'debt collector' definition." *Heintz* v. *Jenkins*, 514 U.S. 291, 295 (1995). Indeed, the Court in *Heintz* held that any reading of the term "debt collector" that would exempt lawyers *per se* was "outside the range of reasonable interpretations of the [statute's] express language." *Id.* at 298. Accord, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787-788 (1975) (noting the "heavy presumption against implicit exemptions," and accordingly refusing to construe the Sherman Act to exempt lawyers). To construe the BAPCPA term "debt relief agency" to exclude lawyers would be even more unwarranted, because that term is defined by reference to services some of which *only* lawyers can perform.

2. The BAPCPA's definition of "debt relief agency" is subject to five exceptions, none of which mentions attorneys, and none of which encompasses attorneys as a class. Rather, the exceptions apply to employees of regulated entities, tax-exempt nonprofits, creditors, banks, and copyright owners. See 11 U.S.C. 101(12A)(A)-(E). As the court of appeals observed, Congress's decision to include five carefully tailored exceptions from the definition of "debt relief agency" but not to make an exception for attorneys strongly implies that no such exception was intended. Pet. App. 9a; see *Hersh*, 553 F.3d at 751; accord, *e.g.*, *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 90-91 (1995).

Petitioners contend (Br. 19-23) that two of the exemptions *implicitly* suggest that the term "debt relief agency" does not encompass attorneys. Neither exemption can bear the weight petitioners place on it. The exclusion of "any person who is an officer, director, employee, or agent of a person who provides [bankruptcy]

assistance," 11 U.S.C. 101(12A)(A), ensures that a regulated attorney's administrative assistant or process server is not separately required to comply with the notice and disclosure provisions of the statute.[7] The exclusion for creditors, which applies only "to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor," 11 U.S.C. 101(12A)(C), makes clear that an attorney acting solely in her capacity as a creditor of the debtor (*e.g.*, a divorce lawyer to whom the debtor owes fees) is not required to comply with the debt relief agency provisions of the Act. That exemption says nothing about whether attorneys are covered when they provide bankruptcy assistance.

3. The relevant legislative history confirms the plain meaning of the statutory text. The abuses of the bankruptcy system that Congress sought to address in the 2005 Act included abuses committed by—and at the encouragement of—debtors' professional representatives.

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[7] Petitioners note (Br. 19-20) that the exemption for "an officer, director, employee, or agent" does not exempt a partner; they assert that lawyers often practice in partnerships; and they argue that, if law firms were covered by the "debt relief agency" definition, Congress would necessarily have included "partners" in the list of exempted employees. But the absence of an exemption for partners does not suggest that partnerships are excluded from the term "any person," because principals (such as partners) differ from employees, agents, officers, and directors in relevant respects. A law firm (or other business entity) is *itself* a debt relief agency if its attorneys or other personnel provide the specified services to consumer debtors under the firm's name, and as a matter of partnership law that designation may well have consequences for the partners. It is therefore unsurprising that Congress did not exempt principals who have the title "partner." In any event, petitioners' premise is flawed: law firms are often organized as corporations or other non-partnership entities, and indeed, the petitioner firm is a corporation, not a partnership. J.A. 37a.

The House Report cited a study by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals." *House Report* 5 (quoting Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: The Civil Enforcement Initiative*, Am. Bankr. Inst. J., Sept. 2002, at 12 (Darling & Redmiles)). Similarly, in adopting the advertising disclosure requirements in 11 U.S.C. 528, Congress heard evidence of "increasingly aggressive lawyer advertising" that offered to make consumers' "debts disappear," but failed to explain that such relief would require a petition for bankruptcy having significant consequences for the debtor's ability to obtain credit in the future. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform: Hearing on H.R. 975 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 55 (2003) (*2003 Hearings*) (statement of Dean Sheaffer, National Retail Federation). Congress responded by enacting the debt relief agency provisions of the 2005 Act to "strengthen[] professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases." *House Report* 17 (emphasis added).

B. Construing The Term "Debt Relief Agency" To Encompass Attorneys Does Not Lead To Absurd Results

Petitioners contend (Br. 24) that treating attorneys as debt relief agencies would lead to "absurd" results. For the most part, the supposed absurdities repackage petitioners' claims of unconstitutionality, see *id.* at 24, 28, and may be rejected for the same reasons, see pp. 27, 28-46, 64-68, *infra*. In addition, however, petitioners

argue that an attorney who represents small creditors in bankruptcy cases could be deemed a "debt relief agency" on the theory that a creditor with debts consumer of his own may be an "assisted person." A "debt relief agency" must include in its public advertising the sentence "We help people file for bankruptcy relief under the Bankruptcy Code," or "a substantially similar statement." 11 U.S.C. 528(a)(4). Petitioners contend (Br. 24) that if an attorney represents a client who appears as a creditor in a bankruptcy proceeding but whose own unrelated consumer debts bring the client within the statutory definition of "assisted person," the attorney's public advertising must state that he "help[s] people file for bankruptcy relief," even if the attorney does not actually provide such assistance and the statement is consequently untrue.

The premise of petitioners' argument is mistaken. A creditor in a bankruptcy proceeding is not an "assisted person" within the most natural reading of that statutory term, even if the creditor owes debts of his own. An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than" an inflation-adjusted sum, currently $164,250. 11 U.S.C. 101(3); see note 2, *supra*. Nothing in the bankruptcy laws depends on whether a creditor's own debts are "primarily * * * consumer debts," or on the value of a creditor's "nonexempt property." Indeed, the very concept of "exempt" property presupposes a bankruptcy filing by the person whose assets are at issue. See 11 U.S.C. 522(b) (describing the property that "an individual *debtor* may exempt from [the] property of the estate") (emphasis added). The natural inference is that the term "assisted person" is limited to debtors in actual or potential bankruptcy pro-

ceedings and does not encompass creditors in such proceedings who happen to owe unrelated debts.[8]

In any event, petitioners do not suggest that the BAPCPA's "debt relief agency" provisions will produce absurd results as applied to petitioners themselves or to bankruptcy lawyers generally—only that the provisions cannot sensibly be applied to bankruptcy attorneys who represent creditors exclusively. And if the term "assisted person" is read to encompass certain creditors in bankruptcy proceedings, construing the term "debt relief agency" to exclude lawyers will not eliminate the anomalous consequences that petitioners identify, because non-attorneys who assist such creditors in bankruptcy cases and advertise their services are also required to make the disclosure mandated by Section 528(a)(4). For those reasons too, the absurdities petitioners purport to fear are best avoided not by reading attorneys out of the term "debt relief agency," but by construing the term "assisted person," in accordance

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[8] Additional evidence in the statute confirms that creditors are not "assisted persons." Section 527, for example, requires debt relief agencies to provide "assisted persons" with information relevant only to debtors, see 11 U.S.C. 527(b), and expressly cross-references provisions applicable only to debtors, see, *e.g.*, 11 U.S.C. 527(a)(1) (instructing debt relief agencies to provide assisted persons with the "notice required under section 342(b)(1)," a provision that applies only to "individual[s]" who "commence[] * * * a case under this title"). Likewise, the written-contract provisions of Section 528 provide that a contract must be signed within five days "after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but *prior to such assisted person's petition under this title being filed.*" 11 U.S.C. 528(a)(1) (emphasis added). The legislative history confirms that common-sense understanding. See *House Report* 17 (explaining that Congress enacted the debt relief-agency provisions of BAPCPA to "strengthen[] professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases").

with Congress's evident intent, as limited to debtors in actual or potential bankruptcy proceedings.

C. The Application Of The BAPCPA To Attorney Conduct Does Not Intrude On Any Traditional State Prerogative

Petitioners suggest (Br. 33-34) that construing the term "debt relief agency" to encompass attorneys would "displace" the role of States in an area they have traditionally regulated. Petitioners contend on that basis (Br. 35) that this Court should require a clear statement of intent to cover attorneys, and that the BAPCPA's definition of "debt relief agency" does not contain the requisite clear statement because it "does not even mention the word 'attorney.'" Those arguments are misconceived.

First, construing the term "debt relief agency" to encompass lawyers does not bar the States from regulating attorney conduct performed in connection with actual or potential bankruptcy proceedings. To the contrary, state law that is not inconsistent with the BAPCPA is expressly saved from preemption. 11 U.S.C. 526(d)(1). A statute allowing concurrent regulation of attorney conduct does not raise any concern that might call for a clear-statement rule.

Second, the BAPCPA's regulation of bankruptcy attorneys is of a piece with a long history of federal regulation of lawyers who practice before federal tribunals or in areas of uniquely federal concern. *E.g.*, 11 U.S.C. 105(a) (recognizing bankruptcy courts' authority to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process"); 11 U.S.C. 329 (requiring bankruptcy lawyers to surrender certain unreasonable fees); Fed. R. Bankr. P. 9011(c);

see 28 U.S.C. 1927; Fed. R. Civ. P. 11(c); Fed. R. App. P. 46(c); Sup. Ct. R. 8.1; see also *Goldsmith* v. *United States Bd. of Tax Appeals*, 270 U.S. 117, 121-123 (1926) (upholding an Article I tribunal's authority to admit lawyers and accountants to practice and prescribe qualifications for admission); 15 U.S.C. 7245 (providing for the Securities and Exchange Commission to issue "minimum standards of professional conduct for attorneys appearing and practicing before the Commission"); 31 C.F.R. 10.20 *et seq.* (rules for practice before the Internal Revenue Service); 37 C.F.R. 10.20 *et seq.* (Patent and Trademark Office Code of Professional Responsibility). See generally *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980) ("The power of a court over members of its bar is at least as great as its authority over litigants."). Federal rules of practice in an area of direct federal interest can even preempt state unauthorized-practice laws, see *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379, 400 n.43, 403 (1963), a step Congress did not deem necessary here, see 11 U.S.C. 526(d)(2)(A). Bankruptcy is a subject of particular federal concern, see U.S. Const. Art. I, § 8, Cl. 4, and there is nothing improper or unusual in Congress's decision in BAPCPA to regulate attorney conduct that threatens the integrity of the bankruptcy system.

Third, even if a clear-statement requirement applied in this setting, it would be satisfied here. Section 101(4A)'s inclusion of "legal representation" as a service that triggers debt-relief-agency status eliminates any reasonable doubt that attorneys are covered, even though that definitional provision does not contain the term "attorney" or "lawyer." A clear-statement rule is not a magic-words requirement; the requisite clear statement may even come from reading multiple provi-

sions together, so long as the meaning is unambiguous. See *BFP* v. *RTC*, 511 U.S. 531, 546 (1994) ("The Bankruptcy Code can of course override by implication when the implication is unambiguous."); cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 76 (2000).

D. The Canon Of Constitutional Avoidance Provides No Basis For Construing The Term "Debt Relief Agency" To Exclude Attorneys

Petitioners further contend that the Court should construe the term "debt relief agency" to exclude attorneys in order to avoid constitutional difficulties. Petitioners correctly state (Br. 31) the general proposition that the avoidance canon permits—indeed, requires—a court to adopt any permissible construction of a statute that avoids a serious constitutional question. See generally pp. 43-46, *infra*. That principle, however, provides no sound basis for departing from the BAPCPA's explicit definition of "debt relief agency."

First, by referring to "legal representation" and other services specific to attorneys, Congress has foreclosed petitioners' purported saving construction, which would render those terms superfluous. See pp. 17-18, *supra*. The avoidance canon is a tool for choosing among permissible constructions; it is not a basis for adopting a construction that the statute unambiguously precludes. See, *e.g.*, *HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002); *Miller* v. *French*, 530 U.S. 327, 341 (2000). The text of the statute and its "legislative history and purpose," *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986), make clear that the term "debt relief agency" encompasses lawyers who perform the relevant bankruptcy-related services.

Second, construing the term to exclude attorneys would not avoid the constitutional questions. Petitioners' constitutional challenges go to the statute's substantive requirements, not directly to the inclusion of attorneys. On petitioners' theory, for example, Section 528(b)(2) is unconstitutional as applied to bankruptcy petition preparers as well, because "no person" would voluntarily refer to himself as a "debt relief agency" in his advertising. Pet. Br. 88. Adopting petitioners' reading of "debt relief agency" therefore would not avoid the constitutional questions that petitioners identify; it would postpone them only until a non-attorney plaintiff filed a similar suit.

Third, petitioners' construction would undermine the efficacy of other statutory provisions whose constitutionality is not in question. See, *e.g.*, 11 U.S.C. 526(a)(1) (debt relief agencies may not fail to perform services they promised to undertake); 11 U.S.C. 527(a)(2) (debt relief agencies must provide their clients with certain admonitions about the requirements of the bankruptcy process). Application of those requirements to attorneys raises no serious constitutional concern. But petitioners' interpretation of the 2005 Act would make all BAPCPA regulation of "debt relief agencies" inapplicable to lawyers. That would disserve Congress's intent to establish "professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases." *House Report* 17 (emphasis added).

II. SECTION 526(a)(4) IS NOT UNCONSTITUTIONALLY OVERBROAD

The court of appeals erred in holding that Section 526(a)(4) violates the First Amendment. The court interpreted Section 526(a)(4) to prohibit attorneys from

advising debtors to incur "any" additional debt prior to bankruptcy. Pet. App. 13a. In the court's view, "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws." *Ibid.* In so holding, the court rejected the government's proposed narrowing construction of Section 526(a)(4) in a single sentence, asserting that the statute's "plain language" precludes any construction other than an unconstitutionally overbroad one. *Id.* at 12a.

Both the court's statutory premise and its constitutional conclusion are flawed. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). As the text, structure, and purposes of Section 526(a)(4) demonstrate, Congress forbade only advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors. The First Amendment does not prevent Congress from regulating the professional conduct of bankruptcy attorneys in this manner. Because Section 526(a)(4) may reasonably be read in a manner that preserves its constitutional validity, the judgment of the court of appeals should be reversed.

A. Section 526(a)(4) Regulates Advice To Incur New Debt For The Purpose Of Abusing The Bankruptcy Code Or Defrauding Creditors

1. The court of appeals ignored the historical meaning of the phrase "in contemplation of bankruptcy"

a. The court of appeals concluded that Section 526(a)(4) "broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted per-

son) to incur any additional debt when the assisted person is contemplating bankruptcy." Pet. App. 12a (emphasis omitted). Section 526(a)(4), however, does not use the temporal language "*when* the assisted person is contemplating bankruptcy." Rather, the statute forbids attorneys from advising clients "to incur more debt *in contemplation of* [bankruptcy]." 11 U.S.C. 526(a)(4) (emphasis added). As Judge Colloton observed, "the phrase 'in contemplation of' has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system." Pet. App. 25a; see *Hersh*, 553 F.3d at 758 (Congress's use of the phrase "in contemplation of" bankruptcy "suggests that the statute is directed at situations in which a debtor intends to abuse the bankruptcy system").

Black's Law Dictionary, for example, defines "contemplation of bankruptcy" as "[t]he thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*." *Black's Law Dictionary* 336 (8th ed. 2004) (emphasis added). That understanding of the term goes back more than a century and a half, to both American and English authorities examining whether particular transfers made just before bankruptcy were in fact made "in contemplation of bankruptcy." See *Black's Law Dictionary* 257 (2d ed. 1910) (citing cases). Those authorities read the phrase as incorporating an element of intent to frustrate the bankruptcy law, not simply an awareness that a bankruptcy was impending.

Members of Congress have used the term "in contemplation of bankruptcy" in the same manner. See, *e.g.*, S. Rep. No. 65, 98th Cong., 1st Sess. 9 (1983) (*1983*

Senate Report) (describing the problem of "[e]xcessive debts incurred within a short period prior to the filing of the petition" as "'loading up' in contemplation of bankruptcy"); *ibid.* ("In many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent."); *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. I, at 11 (1973) (*Bankruptcy Commission Report*) ("[T]he most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge.").

b. Of the cases treating "in contemplation of bankruptcy" as incorporating an element of abusive purpose, most have involved preferential transfers—*i.e.*, payments made on the eve of bankruptcy to one or more favored creditors. Such transfers are generally contrary to the bankruptcy-law principle that all similarly situated creditors should share proportionately in the bankrupt's remaining assets. See, *e.g.*, 11 U.S.C. 547(b). Some early bankruptcy statutes in this country and in England provided that transfers "in contemplation of bankruptcy" were void. Interpreting those statutes, several courts held that they required proof of intent to violate the bankruptcy laws' framework for protecting creditors—*i.e.*, an "intention of giving a preference in contemplation of bankruptcy." *Jones* v. *Howland*, 49 Mass. (8 Met.) 377, 386 (1844); accord *In re Pearce*, 19 F. Cas. 50, 53 (D. Vt. 1843) (No. 10,873) (concluding that an act was done "in contemplation of bankruptcy" if a person did it "in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being

declared bankrupt at his own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy.*") (emphasis added); see also *Paulding* v. *Chrome Steel Co.*, 94 N.Y. 334, 338, 340-341 (1894) (interpreting state law that voided transfers "in contemplation of the insolvency of [the] company").

As the court explained in *Jones*, the indispensable element under those statutes was the debtor's "design" or "view to give [the transferee] a preference over the general creditors." 49 Mass. (8 Met.) at 385, 386. The court drew on English decisions establishing that principle. See *id.* at 384 (construing "'the meaning of those words' (in contemplation of bankruptcy)" as requiring an "'intent to defeat the general distribution of effects which takes place under a commission of bankrupt'") (quoting *Morgan* v. *Brundrett*, 5 Barn. & Ad. 289, 296, 110 Eng. Rep. 798, 801 (K.B. 1833) (Parke, J.)); *id.* at 385 (an act made in contemplation of bankruptcy "must be intended in fraud of the bankrupt laws") (quoting *Fidgeon* v. *Sharpe*, 5 Taunt. 539, 545-546, 128 Eng. Rep. 800, 802-803 (C.P. 1814) (Gibbs, C.J.)).

In many of the above cases, the debtor had made a payment to a favored creditor on the eve of bankruptcy, and the question was whether he had done so with the abusive purpose of preventing the equal distribution of assets that the bankruptcy system seeks to achieve. Section 526(a)(4), conversely, is directed at the amassment of additional debt (rather than the distribution of the debtor's existing assets) on the eve of bankruptcy. In both instances, the debtor intends to disfavor a sub-

set of creditors by taking advantage of the bankruptcy system.[9]

c. In light of that history, Congress's use of the phrase "in contemplation of [bankruptcy]" suggests a focus on the accumulation of debt with intent to abuse the bankruptcy system or defeat the bankruptcy laws. For example, advising a debtor to obtain unsecured credit on the eve of bankruptcy and then to dissipate it on purchases (*e.g.*, a vacation or lavish banquet) that do not become part of the bankruptcy estate, knowing that the bankruptcy discharge will allow her to avoid repayment of the debt, is an abuse of the bankruptcy system.

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[9] Petitioners assert (Br. 60-61) that this Court gave a different reading to the phrase "in contemplation of bankruptcy" in *Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472 (1933), but in fact, that case, too, involved a statute intended to combat abuse of the bankruptcy system, and the Court interpreted the statute in accord with that purpose. Congress had granted bankruptcy courts the authority to reexamine transfers of property made to a debtor's attorney "in contemplation of the filing of a petition," and to direct that any "excess" payment be returned to the estate for the benefit of creditors—a means of combating the same sort of preferential conveyances as in the cases discussed above. 11 U.S.C. 96(d) (1928). The debtor's attorney objected to turning over an excessive eve-of-bankruptcy payment, and the only question before the Court was whether, "as [a] matter of law," the payment was precluded from being "in contemplation of bankruptcy" because the debtor was pursuing other options in addition to bankruptcy. 289 U.S. at 478-479. The Court saw no such limitation and confirmed the factual finding that the debtor had been contemplating bankruptcy when it had made the excessive payment to its attorneys. See *ibid.* Thus, even if the Court could be said to have construed the statutory term comprehensively, rather than merely to have rejected artificial limitations on it, its holding is consistent with the discussion above, because the Court sustained recouping the payment as abusive. Moreover, in that case the Court did not construe the statute in light of the doctrine of constitutional avoidance or hold that its construction was the only reasonable one.

Cf. *Attorney Grievance Comm'n* v. *Culver*, 849 A.2d 423, 443-444 (Md. 2004) (attorney violated state ethics rules by urging a client to obtain new credit cards and new cash advances with the intent of discharging the debt in bankruptcy). Similarly, advising a debtor to take on additional debt as a way of circumventing the Bankruptcy Code's means testing mechanism is an attempt to defeat the bankruptcy laws. As discussed more fully below, eligibility for a Chapter 7 discharge often turns on a means test that examines the amount by which the debtor's income exceeds his statutorily allowed expenses, including expenses for secured debt. See pp. 35-37, *infra*. If a client is presumed ineligible under this means test, an unscrupulous attorney who advises the client to take on additional debt as a way of becoming eligible for a complete discharge under Chapter 7 is abusing the bankruptcy system. Section 526(a)(4) prohibits an attorney or other debt relief agency from advising debtors to engage in such manipulative conduct.

2. The legislative history of Section 526(a)(4), and its place in the larger statutory scheme, confirm that it targets abusive practices and does not broadly encompass all advice to incur new debt at a time when bankruptcy is imminent

a. Congress has long been aware that the relief afforded by the bankruptcy laws creates a perverse incentive for debtors to amass additional debt with the expectation of obtaining a discharge. Congress has also recognized that this practice poses a fundamental threat to the Bankruptcy Code's twin goals of affording debtors a fresh start while providing an orderly and equitable system of resolving creditors' claims.

As early as 1973, Congress was informed that "the most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge." *Bankruptcy Commission Report* 11. A decade later, Congress enacted 11 U.S.C. 523(a)(2)(C) (1988), which created a presumption that certain eve-of-bankruptcy debts are not dischargeable. The accompanying Senate Report emphasized that "[e]xcessive debts incurred within a short period prior to the filing of the petition present a special problem: that of 'loading up' in contemplation of bankruptcy." *1983 Senate Report* 9. The report explained that "[a] debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property," noting that "[i]n many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent." *Ibid.* As the report concluded, "[n]ot only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation. During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts." *Ibid.*

Congress has enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections. Even before the 2005 Act, Congress authorized bankruptcy courts to dismiss a petition for "substantial abuse," 11 U.S.C. 707(b) (2000), which could include the debtor's purposeful accumulation of debt in contemplation of bankruptcy. *E.g.*, *Price* v. *United*

States Tr. (In re Price), 353 F.3d 1135, 1139-1140 (9th Cir. 2004). Congress also precluded debtors from obtaining a discharge for debts arising from the fraudulent acquisition of money or credit, 11 U.S.C. 523(a)(2)(A) (2000), and as noted above, it provided that certain categories of debts are presumed nondischargeable if they are incurred on the eve of bankruptcy, 11 U.S.C. 523(a)(2)(C) (2000).

b. When Congress enacted the BAPCPA in 2005, the House Committee expressed concern that those earlier measures had not adequately restricted the ability of debtors to "knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." *House Report* 15. Accordingly, Congress strengthened each of the aforementioned protections against bankruptcy abuse. See, *e.g.*, BAPCPA § 310, 119 Stat. 84 (11 U.S.C. 523(a)(2)(C)). In particular, Congress greatly expanded the bankruptcy courts' authority to dismiss petitions or deny relief for "abuse" of the bankruptcy system, including in cases in which debtors purposefully incur additional debt in contemplation of filing a petition. See BAPCPA § 102, 119 Stat. 27 (11 U.S. 707(b)); *House Report* 48-49. Among other reforms, Congress permitted dismissal of a petition based on a less stringent showing of abuse, see § 102(a)(2)(B)(i)(III), 119 Stat. 27 (11 U.S.C. 707(b)(1)); authorized "any party in interest" to file a motion to dismiss for abuse (except in some cases involving lower-income debtors), see 11 U.S.C. 707(b)(1) and (6); and repealed the pre-existing presumption in favor of granting the relief sought by the debtor, see 11 U.S.C. 707(b) (2000). See generally *House Report* 49.

Congress also made another significant change that underscored the need for direct regulation of attorneys

who practice in the federal bankruptcy system. The "principal consumer bankruptcy reform" in the 2005 Act was the adoption of a "means testing" mechanism intended to ensure that debtors who have the ability to repay at least some of their debts will do so, through a structured repayment plan entered under Chapter 13 of the Bankruptcy Code, instead of obtaining a complete discharge under Chapter 7. *House Report* 48; see *id.* at 2 (describing means testing as the "heart" of the 2005 Act's reform provisions). See generally 11 U.S.C. 109(b) and (c) (eligibility for Chapter 7 and Chapter 13).

Under the means test, a debtor's petition for complete relief under Chapter 7 is presumed to be abusive if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See 11 U.S.C. 707(b)(2)(A)(i) and (iii).[10] If the court finds a petition to be abusive under this standard, it can dismiss the debtor's case or, with the debtor's consent, convert it to Chapter 13, which involves a repayment plan. 11 U.S.C. 707(b)(1). The means test, however, exacerbates the incentive for debtors to manipulate the system by "loading up" on certain debt in contemplation of filing, because payments on secured debts that qualify under Section 707(b)(2)(A)(iii) offset the debtor's monthly income under the formula. Increasing the amount of such payments may therefore reduce the difference between the debtor's income and his allowable expenses, and thus

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[10] If the presumption does not apply, or if it is rebutted, the petition may still be dismissed for abuse: in those circumstances, the 2005 Act directed that bankruptcy courts consider "whether the debtor filed the petition in bad faith" and whether "the totality of the circumstances * * * of the debtor's financial situation demonstrates abuse." 11 U.S.C. 707(b)(3).

allow the debtor to remain eligible for a complete and immediate discharge of unsecured debt under Chapter 7.

Congress was accordingly concerned that the introduction of the means test would give attorneys an incentive to counsel their clients to take on additional debt before filing for bankruptcy. As one bankruptcy judge testified, "[t]he more debt that is incurred prior to filing, the more likely the debtor will qualify for chapter 7." *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. I, at 25 (1998) (*1998 Hearings*) (statement of Judge Randall J. Newsome). Thus, the bankruptcy judge testified that, "[p]erverse as it may seem, I can envision debtor's counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford (at least until the bankruptcy is filed) as a way of increasing their deductions under [the means test]." *Ibid.*; see also *Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. Pt. II, at 30 (1999) (*1999 Hearings*) (statement of Judge William Brown). And as discussed above, see p. 21, *supra*, Congress credited evidence compiled by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals [and] problems associated with bankruptcy petition preparers." *House Report* 5 (quoting Darling & Redmiles 12).

c. Congress responded to these concerns by "strengthening professionalism standards for attorneys and

others who assist consumer debtors with their bankruptcy cases" in return for a fee. *House Report* 17. Under the amended provisions of the Code, an attorney who represents a consumer debtor in filing a bankruptcy petition must make her own reasonable investigation into the circumstances giving rise to the debtor's petition, including a specific inquiry into the veracity of the debtor's debt and asset schedules. See 11 U.S.C. 707(b)(4)(C)-(D). By signing the petition, the attorney personally certifies that the debtor's petition "is well grounded in fact," 11 U.S.C. 707(b)(4)(C)(ii)(I); that the attorney has "no knowledge * * * that the information in the schedules filed with such petition is incorrect," 11 U.S.C. 707(b)(4)(D); and that the debtor's petition "does not constitute an abuse" under Section 707(b), 11 U.S.C. 707(b)(4)(C)(ii)(II). Congress thus effectively required bankruptcy attorneys to warrant that their clients' prepetition conduct and financial circumstances—including any assumption of debt in contemplation of bankruptcy—do not provide grounds for dismissal of the petition as an abuse of the bankruptcy system.

As the foregoing discussion demonstrates, Congress enacted the BAPCPA to protect creditors and the bankruptcy system from abusive eve-of-bankruptcy conduct. That overall statutory focus reinforces the conclusion that the phrase "in contemplation of [bankruptcy]" in Section 526(a)(4) should be construed, in accordance with its historically accepted meaning, as limited to advice that debtors incur additional debt to abuse the bankruptcy system or defeat the administration of the bankruptcy laws. See *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a stat-

ute must be read in their context and with a view to their place in the overall statutory scheme.").

d. Section 526(a)(4) is one of four subsections of Section 526(a). The other three subsections establish rules of professional conduct that are clearly designed to protect debtors from abusive practices by their attorneys and other debt relief agencies. See 11 U.S.C. 526(a)(1) (requiring debt relief agencies to perform all promised services); 11 U.S.C. 526(a)(2) (prohibiting debt relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief); 11 U.S.C. 526(a)(3) (prohibiting debt relief agencies from misrepresenting to debtors the costs or benefits of bankruptcy). The placement of Section 526(a)(4) as the fourth item in this list strongly implies that Congress likewise intended that provision to target abusive conduct by debt relief agencies.[11]

The BAPCPA's remedial provisions similarly belie petitioners' contention that Section 526(a)(4) prohibits debt relief agencies from advising debtors to incur additional debt in circumstances where such conduct would be lawful and prudent. As the Fifth Circuit observed, the principal remedy for a violation of Section 526(a)(4) is a suit against the attorney to recover the debtor's "actual damages," as well as restitution of any fees paid by the debtor. *Hersh*, 553 F.3d at 759-760 (citing 11 U.S.C. 526(c)). "Congress's emphasis on actual damages for violations of section 526(a)(4) strongly suggests that Congress viewed that section as aimed at advice to debtors which if followed would have a significant risk of

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[11] Similarly, Section 526(c) establishes a malpractice remedy against any debt relief agency whose "intentional or negligent failure to file any required document" causes the client to suffer dismissal or conversion of her bankruptcy case. 11 U.S.C. 526(c)(2)(B).

harming the debtor." *Id.* at 760. By contrast, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." Pet. App. 27a (Colloton, J., concurring in part and dissenting in part). "The remedial focus of § 526 thus bolsters the proposition that § 526(a)(4) was aimed only at advice given by a debt relief agency that is designed to abuse the bankruptcy process." *Ibid.*[12]

3. A federal rule of professional conduct in this setting serves an important function

Amici NACBA et al. assert (Br. 18-20) that reading Section 526(a)(4) as an ethical rule of this nature would render the provision "superfluous," because the Bankruptcy Code already penalizes debtors when they engage in abusive bankruptcy conduct and attorneys are already subject to state-law ethical obligations. That reasoning is flawed.

To be sure, the client who takes the attorney's unethical advice may well suffer adverse consequences under bankruptcy law, including having her petition dismissed. 11 U.S.C. 707(b)(2) and (3). Congress determined, however, that when such a consequence results from an attorney's misconduct, remedies should lie against the attorney—including compensation for the client. See 11 U.S.C. 526(c)(2)(A). Invalidation of Section 526(a)(4)

[12] Amici NACBA et al. observe (Br. 22) that Section 526(c)(3) permits not only recovery of actual damages, but also disgorgement of fees, when a client can establish that a debt relief agency has "intentionally or negligently failed to comply with any provision of [Section 526]." But even though actual damages are not required in every case, Section 526's emphasis on private enforcement of the statute, by the clients themselves, serves to confirm that Congress expected that violations would harm clients.

would render that remedy unavailable with respect to a significant category of improper attorney advice.

Although an attorney who engages in the conduct that Section 526(a)(4) prohibits may be subject to discipline by a state bar, providing a federal remedy under the Bankruptcy Code serves important purposes. First, the Code creates a uniform nationwide standard, appropriate to bankruptcy practice. Second, the Code gives a client a private right of action against an unethical attorney who has violated Section 526(a)(4), and it encourages such actions in the public interest by providing for fee-shifting. 11 U.S.C. 526(c)(2). State bar rules rarely if ever are privately enforceable. Third, the Code permits the federal court to enjoin an attorney from violating Section 526 again in any State or district, 11 U.S.C. 526(c)(3)(A) and (5)(A), whereas an unethical practitioner who has been sanctioned under the law of one jurisdiction may continue to provide unethical advice in another. Indeed, a practitioner in a particular bankruptcy court may not even be licensed by that State's bar. See, *e.g.*, *Rittenhouse* v. *Delta Home Improvement, Inc. (In re Desilets)*, 291 F.3d 925, 930-931 (6th Cir. 2002).

4. Section 526(a)(4) does not cover petitioners' examples of appropriate debt counseling or the provision of information concerning a client's legal options

For the reasons set forth above, Section 526(a)(4) does not cover the hypothetical scenarios that troubled the court of appeals. See Pet. App. 13a-14a (postulating two situations in which "it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt" before bankruptcy, and speculating that "[f]actual scenarios other than these few hypothetical situations no doubt exist").

Contrary to the court's interpretation, an attorney would be free to advise a client to refinance her home mortgage at a lower rate to prevent bankruptcy, provided all appropriate disclosures were made to the lender.[13] See *id.* at 13a. Likewise, an attorney could lawfully advise a client to incur "additional secured debt" to purchase a reliable automobile and thereby ensure her ability to get to work, assuming again that appropriate disclosures were made. See *id.* at 14a. In neither case would the attorney be advising the debtor to incur unnecessary debt for the purpose of abusing the bankruptcy system. See *Hersh*, 553 F.3d at 761. The similar examples cited by petitioners (Br. 48-53) are outside the scope of the statute for the same reason.

Petitioners also suggest (Br. 41) that Section 526(a)(4) unconstitutionally prohibits attorneys from "participat[ing] in a discussion with the client weighing the pros and cons of a client's pending decision to incur more debt." That contention reflects a misreading of the statutory text, even assuming it refers only to discussions of "loading up" on debt in contemplation of bankruptcy. Section 526(a)(4) does not bar discussions *about* incurring new debt (however abusive the transaction might be), but only affirmative advice "*to incur* more debt in contemplation of" filing a petition for bankruptcy. 11 U.S.C. 526(a)(4) (emphasis added).[14]

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[13] The court of appeals did not explain its apparent assumption that refinancing an existing debt—that is, exchanging one loan for another with the same principal balance but a different interest rate or repayment period—would constitute incurring "more debt" within the meaning of Section 526(a)(4).

[14] The statute unambiguously requires affirmative encouragement to incur more debt, although that encouragement might be communicated in a variety of ways (both direct and indirect).

Rules governing legal practice commonly distinguish between discussion of options and affirmative advice or encouragement. For example, while the ABA Model Rules of Professional Conduct provide that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," the same rule states that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Model Rules of Prof'l Conduct R. 1.2(d). The commentary to Model Rule 1.2 underscores the point: "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." *Id.* R. 1.2, cmt. 9. Section 526(a)(4)'s use of the phrase "advise * * * *to incur* more debt" captures the same distinction between discussion and affirmative encouragement. Cf. *Webster's Third New International Dictionary* 32 (1993) (defining "advise" to mean, *inter alia*, "counsel" or "recommend").

B. The Court of Appeals Disregarded Basic Principles Of Constitutional Avoidance

To the extent that the proper interpretation of Section 526(a)(4) is open to question, the court of appeals was not justified in adopting the broadest possible interpretation of the provision and then declaring it unconstitutional as so construed. Federal courts construe federal statutes to avoid, not invite, constitutional difficulties. *Boos* v. *Barry*, 485 U.S. 312, 331 (1988). Particularly in the context of a First Amendment overbreadth challenge, where the plaintiff contends that a statute is

invalid even though it may be legitimately applied in some or many circumstances, the federal courts have not only "the *power* to adopt narrowing constructions," but "the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Id.* at 330-331 (emphasis added); see also, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").[15] In this case, however, the court of appeals held Section 526(a)(4) unconstitutional without adverting to the doctrine of constitutional avoidance or explaining why its broad interpretation of Section 526(a)(4) was the *only* available reading of the statute. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("*[E]very* reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (emphasis added; citation omitted).

This Court has repeatedly applied saving constructions to avoid invalidating Acts of Congress far less amenable to a narrowing interpretation. In *Boos*, the Court considered a First Amendment overbreadth challenge to a statute that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and

[15] Petitioners argue (Br. 31-35) that the Court should construe the term "debt relief agency" to avoid the same constitutional overbreadth objection. As discussed at pp. 26-27, *supra*, however, petitioners' proposed construction is foreclosed by the statutory definition of the term "debt relief agency," and it would seriously undermine numerous regulations of debt relief agencies that are unquestionably constitutional. By contrast, the phrase "in contemplation of [bankruptcy]" is not defined and can reasonably be read to avoid constitutional problems, particularly in light of the interpretation that phrase has historically been given in the bankruptcy context.

refuse to disperse after having been ordered so to do by the police." 485 U.S. at 329 (citation omitted). The Court acknowledged that "[s]tanding alone, this text is problematic * * * because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330. Nevertheless, citing the federal courts' "duty to avoid constitutional difficulties" when a narrowing "construction is fairly possible," the Court construed the statute to apply "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'"—a limitation unstated in the statutory text but necessary to ensure the validity of the Act. *Id.* at 330-331 (citation omitted). See also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.*, 485 U.S. at 576-578. Here, the interpretation of Section 526(a)(4) that was advanced by the government and endorsed by the dissent below, and that the Fifth Circuit adopted in *Hersh*, see 553 F.3d at 754, is consistent with the text of that provision and with the BAPCPA's overall structure and purposes. The court of appeals erred in refusing to adopt it.

Petitioners contend (Br. 64-66) that adopting a narrowing construction, instead of reading the statute to its broadest extent (and then striking it down as overbroad), would create a problem of "vagueness" and would therefore "chill" lawful advice. As explained above, however, the government's construction of Section 526(a)(4) as limited to a particular set of abusive practices is firmly tethered to the text, history, and purpose of the statute. See pp. 28-40, *supra*. The impropriety of those practices is already well-established, and even if it were not, any attorney signing a bankruptcy petition must already certify that the petition "does not constitute an abuse under [11 U.S.C. 707(b)(1)]." 11

U.S.C. 707(b)(4)(C)(ii)(II). That certification requires familiarity with longstanding precedent interpreting the Bankruptcy Code's references to "abuse" and "substantial abuse." See, *e.g.*, *Price*, 353 F.3d at 1139-1140.[16] Thus, attorneys are already required to be on notice of the practices that are treated as abusive under the Bankruptcy Code; Section 526(a)(4) simply bars attorneys from encouraging their clients to commit one such abusive practice.

C. Section 526(a)(4) Is Consistent With The First Amendment

If Section 526(a)(4) is given the limiting construction described above, the provision easily satisfies the First Amendment. The advice that Section 526(a)(4) covers is subject to reasonable regulation in the service of the government's valid interests in protecting the bankruptcy system and its participants from unethical conduct.

1. A licensed attorney's ethical obligations to the bench and the profession sometimes require her to exercise a degree of restraint in what she advocates and how. "'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo, J." *Gentile* v. *State Bar*, 501 U.S. 1030, 1066 (1991) (quoting *In re Rouss*, 221 N.Y. 81, 84 (1917), cert.

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[16] Indeed, amici NACBA et al. acknowledge (Br. 19) the substantial commonality between the required certification and the conduct that Section 526(a)(4) prohibits on the government's reading. Contrary to amici's contentions, however, the government's reading does not make Section 526(a)(4) superfluous: the certification provides some protection against abusive *filings*, whereas Section 526(a)(4) specifically prohibits a certain type of unethical *advice* that may or may not lead to an abusive filing. Section 526(a)(4) also prescribes different, more client-protective remedies. Compare 11 U.S.C. 526(c)(2), with 11 U.S.C. 707(b)(4)(B).

denied, 146 U.S. 661 (1918)). As the Court held in *Gentile*, attorneys are not merely self-interested actors and agents of their clients, but also licensed officers of the courts. For that reason, attorneys may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.* at 1071; see *Goldfarb*, 421 U.S. at 792 (the government's interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'"). "This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies." *Gentile*, 501 U.S. at 1082 (O'Connor, J., concurring).

In articulating those principles, the Court in *Gentile* broke no new ground. Rather, the Court explained that five Justices in *In re Sawyer*, 360 U.S. 622 (1959), had agreed that "lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile*, 501 U.S. at 1071. Justice Stewart's controlling concurrence in *Sawyer* rejected the notion "that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct," because "[a] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice." 360 U.S. at 646 (Stewart, J., concurring in the result). Justice Stewart concluded that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.* at 646-647. Four other Members of the Court agreed. See *id.* at 666-669 (Frankfurter, J., dissenting). See also *Ohralik* v. *Ohio*

State Bar Ass'n, 436 U.S. 447, 460 (1978) (sustaining a restriction on attorney solicitation because the government "bears a special responsibility for maintaining standards among members of the licensed professions"); *In re Primus*, 436 U.S. 412, 422 (1978); *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961) ("[L]awyers must operate * * * as assistants to the court in search of a just solution to disputes.").

2. Respondents are incorrect in contending (Br. 66-67) that Section 526(a)(4), in its application to respondents' provision of legal advice, is subject to strict scrutiny rather than to the *Gentile* standard. There is no basis on which to distinguish bar members' obligations when practicing in bankruptcy court, or when counseling debtors who are considering the initiation of bankruptcy proceedings, from Gentile's obligations as a practitioner in the Nevada trial court. Bankruptcy is a judicial function performed by judicial officers appointed and supervised by the Article III judiciary. A bankruptcy petition both invokes the "core * * * federal bankruptcy power" to undertake "the restructuring of debtor-creditor relations," and also potentially brings related adversary proceedings within the bankruptcy court's jurisdiction. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). And bankruptcy courts generally have the same implicit powers as other federal courts to admit and discipline attorneys and otherwise enforce "submission to their lawful mandates," *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821)). See, *e.g.*, *Price* v. *Lehtinen* (*In re Lehtinen*), 564 F.3d 1052, 1058 (9th Cir. 2009), petition for cert. pending, No. 09-113 (filed July 24, 2009); *Jones* v. *Bank of Santa Fe* (*In re Courtesy Inns, Ltd.*), 40 F.3d

1084, 1089 (10th Cir. 1994); see also *Marrama* v. *Citizens Bank*, 549 U.S. 365, 375-376 (2007).

An attorney who advises or otherwise assists in an abuse of the bankruptcy system breaches his obligations to the tribunal and to the judicial system. The fairness and public reputation of bankruptcy proceedings are directly harmed when the bankruptcy discharge is misused to gain an improper benefit at an unsecured creditor's expense, or when the standards of eligibility for the discharge are gamed by taking on new and unnecessary debt on the eve of bankruptcy. Cf. *Marrama*, 549 U.S. at 375 (bankruptcy court's authority "'to prevent an abuse of process'" is "surely adequate" to order a halt to "action prejudicial to creditors") (quoting 11 U.S.C. 105(a)).

Contrary to petitioners' contention (Br. 75-76), the principles announced in *Gentile* are not limited to attorney conduct in connection with criminal litigation. Although Gentile's unethical conduct included public statements about a pending criminal matter, the ethical rule he violated related to any "adjudicative proceeding," 501 U.S. at 1033 (opinion of Kennedy, J.) (quoting Nev. Sup. Ct. R. 177(1)), and the Court's opinion drew on cases from the civil as well as criminal context, see *id.* at 1071, 1073-1074. The considerations that were held to justify the ethical rule there—preventing improper considerations from influencing the outcome of the proceeding or tainting the venire—were not limited to criminal trials or to trial-level proceedings. See *id.* at 1075; cf. *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009).

Petitioners' reliance (Br. 35-36, 43) on *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), is misplaced. The statute at issue in *Velazquez* conditioned the receipt

of federal funds on an attorney's agreement not to challenge the validity of state or federal welfare laws. *Id.* at 538. The provision did not purport to regulate attorney ethics or avoid client abuses, but rather prevented attorneys from making "all the reasonable and well-grounded arguments necessary for proper resolution of the case." *Id.* at 545. Section 526(a)(4), by contrast, prevents attorneys from *subverting* the bankruptcy process and jeopardizing their clients' interests by encouraging abuses of the Bankruptcy Code.

3. Section 526(a)(4) is constitutional under the *Gentile* standard. As the Fifth Circuit explained in *Hersh*, Section 526(a)(4) provides a bankruptcy-specific analogue to Rule 1.2(d) of the Model Rules of Professional Conduct, which states that an attorney may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent." 553 F.3d at 756 (citation omitted). Versions of that rule are in effect throughout the Nation, including in petitioners' home State. Rule 1.2(d) has never been challenged under the First Amendment, much less held to violate it. *Ibid.*[17] Indeed, the court of appeals acknowledged that Section 526(a)(4) is supported by a legitimate government inter-

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[17] *Culver* illustrates the application of Rule 1.2(d) to the kind of advice that Section 526(a)(4) prohibits. In *Culver*, the client expressed concern about taking on more debt. Attorney Culver not only "advised her to obtain more credit cards and take cash advances on the cards to pay his fees," but also "explained *that she would not have to repay that money* because he would represent her to have the debts discharged in bankruptcy." 889 A.2d at 429 (emphasis added). He even gave her an application for a credit card. *Id.* at 444. The state court unanimously concluded that because the client could not repay the debt and "the bankruptcy discussions were in the context of present intent to avoid repaying the debt," Culver had committed a fraudulent act in violation of Rule 1.2(d). *Ibid.*

est; the court's conclusion that the statute was nonetheless unconstitutional depended on its adoption of petitioners' overly broad reading of the statute's scope. See Pet. App. 12a.

Amicus American Bar Association (ABA) suggests (Br. 10-11 & n.15) that Section 526(a)(4) is infirm because Congress has not barred *debtors* from assuming more debt in contemplation of bankruptcy. That argument lacks merit, for several reasons. First, in some cases covered by Section 526(a)(4), the client's conduct will itself be illegal. See, *e.g.*, *Hersh*, 553 F.3d at 755 ("Taking out loans without intending to repay them may also be considered theft under state law."); see also 18 U.S.C. 157 (bankruptcy fraud statute); 1 *Collier on Bankruptcy* ¶ 7.07[1][a] at 7-121 (Dec. 1996) (*Collier*) ("Misrepresenting one's financial status, presumably to profit by inducing others to extend goods or services on credit, seems to qualify."). In those cases, the attorney unquestionably has no First Amendment right to advise the client to engage in that conduct. Neither an attorney nor any other individual has a constitutional right to participate in the commission of a crime. Offers to engage in unlawful activity "enjoy no First Amendment protection." *Williams*, 128 S. Ct. at 1841; see also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-389 (1973) (same rule applies to unlawful activity that is not criminally proscribed). An attorney's recommendation that a client incur additional debt in order to defraud creditors is not constitutionally protected "abstract advocacy of illegality"; it is "speech * * * that is intended to induce or commence illegal activities." *Id.* at 1842; see also *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-448 (1969) (per curiam).

In other cases, the client may not be susceptible to prosecution because he lacks the requisite intent. Cf. *Culver*, 849 A.2d at 429. Even in that situation, however, the government has a strong interest in preventing the rendering of professional advice that could lead to the subversion of the bankruptcy system. Cf. *Roadway Express*, 447 U.S. at 765 (relying on the "well-acknowledged inherent power of a court" to remedy and prevent "abusive litigation practices") (citation omitted). That is especially so in a context like this one, in which the sole reason why the client is not guilty of a crime may well be that he has relied on advice from counsel to undertake a particular course of action, which itself may be sufficient to defeat the intent element. See 1 *Collier* ¶ 7.07[1][d] at 7-130 (June 2004) (advice of counsel may be a defense to bankruptcy fraud). The ABA's position would insulate attorneys from liability by virtue of their very success in insulating their clients. That double-fisted protection for abusive bankruptcy practices cannot be constitutionally required.

Attorneys have long been subject to discipline, or to malpractice liability, for recommending courses of action that are unethical even if not illegal (or tortious). For instance, an attorney may be disciplined for involvement in concealing assets, even if the concealment does not satisfy all of the elements of an unlawful fraudulent conveyance. *In re Kenyon*, 491 S.E.2d 252, 254 (S.C. 1997) ("We do not have to find fraudulent conveyances—only fraudulent or dishonest conduct."); accord *In re Conduct of Hockett*, 734 P.2d 877, 882-883 (Or. 1987).

The authority to impose discipline for unethical conduct is on particularly strong ground where, as here, the attorney's improper advice affects not only the client, but the judicial system to which the attorney owes a pro-

fessional obligation. See *Gentile*, 501 U.S. at 1075-1076 (describing the "substantial state interest" in "protect[ing] the integrity and fairness of a State's judicial system" against prejudicial conduct by "officers of the court," who "have a duty to protect its integrity"). Thus, for example, attorneys may be sanctioned for advising their clients to engage in various unethical conduct (such as hiring a lawyer strategically to force a judge's recusal) that the client may lawfully undertake but that is prejudicial to the administration of the legal system. See *McCuin* v. *Texas Power & Light Co.*, 714 F.2d 1255, 1264-1266 (5th Cir. 1983) ("Lawyers are not permitted to do everything for a client that he would stoop to do himself had he but their knowledge."); *Grievance Adm'r* v. *Fried*, 570 N.W.2d 262, 264, 267 (Mich. 1997). The same principle applies here: rules of professional conduct "may demand some adherence to the precepts of [the judicial] system in regulating [attorneys'] speech as well as their conduct" when that speech, if acted upon, directly undermines that system. *Gentile*, 501 U.S. at 1074.[18]

D. The Court Of Appeals Failed To Apply Basic Principles Of Overbreadth Analysis

Because "invalidating a law that in some of its applications is perfectly constitutional * * * has obvious harmful effects," this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the stat-

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[18] The same First Amendment standard logically applies to the work of bankruptcy petition preparers, who owe equivalent professional obligations to the tribunal that will adjudicate the petitions they prepare. See 11 U.S.C. 110(h)-(k) (providing for discipline of bankruptcy petition preparers).

ute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. The court of appeals failed to adhere to that principle when it struck down Section 526(a)(4) as applied to attorneys without giving proper weight to the statute's admittedly legitimate applications.

As shown above, Section 526(a)(4) may validly be applied to a significant category of unethical attorney advice. Against that legitimate sweep, the court below hypothesized two instances of legitimate, ethical advice to accumulate new debt on the eve of bankruptcy: buying a car and refinancing a mortgage. Pet. App. 13a-14a. The court speculated that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. On that slim and concededly "hypothetical" basis, the majority held the statute unconstitutional as applied to *all* attorney conduct, including the abusive practices at which Section 526(a)(4) was directly aimed.

That approach was misconceived. As explained above, Section 526(a)(4) as properly construed does not cover the hypothetical examples discussed by the court. See pp. 41-42, *supra*. But even if some situations could be hypothesized in which Section 526(a)(4) prohibits attorney speech without a constitutionally adequate justification, that is no basis for invalidating all applications of the provision to attorneys, as the court of appeals did here. As Judge Colloton observed, "a facial challenge resting on a 'few hypothetical situations' * * * is unlikely to justify invalidating a statute in *all* of its applications, because 'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" Pet. App. 24a (quoting *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800

(1984)). That correct understanding of overbreadth analysis precludes invalidation of Section 526(a)(4).

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CHALLENGE TO THE ADVERTISING-DISCLOSURE REQUIREMENTS OF 11 U.S.C. 528

Petitioners' challenge to the advertising-disclosure requirements of 11 U.S.C. 528 is likewise without merit. Those requirements apply only to publicly disseminated offers to perform bankruptcy-related services for a fee; they impose no restriction on what advertisers may say; and they mandate the inclusion of only a brief disclaimer whose substance is factually accurate and whose precise wording may be varied as needed. Applying the First Amendment standard that governs commercial advertising disclaimers, the court of appeals correctly concluded that Section 528's modest disclosure requirements are "reasonably and rationally related to the government's interest in preventing the deception of consumer debtors." Pet. App. 19a.

A. Disclosure Requirements In Commercial Advertising Must Bear A "Reasonable Relationship" To A Valid State Interest

1. Attorney advertisements are quintessential commercial speech. See, *e.g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995) (*Went For It*); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1976). While this Court has invalidated categorical bans on advertisements of legal services, *Bates* v. *State Bar*, 433 U.S. 350 (1977), it has recognized that attorney advertising and other forms of solicitation may be regulated without triggering the requirements of strict scrutiny. See, *e.g.*, *Went For It*, 515 U.S. at 623-624. In addition, the Court

has drawn a sharp distinction between commercial-speech regulations that *preclude* an advertiser from communicating a truthful commercial message, see, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *Edenfield* v. *Fane*, 507 U.S. 761 (1993), and disclosure requirements, which simply mandate the inclusion of *additional* information that helps to prevent deception of the public. The Court has held that disclosure requirements are subject to more deferential scrutiny than are outright restrictions on advertising content. See *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650-652 (1985); see also *In re R.M.J.*, 455 U.S. 191, 201 (1982); *Bates*, 433 U.S. at 384 (States may require attorney advertisements to include a "warning or disclaimer * * * so as to assure that the consumer is not misled").

That distinction is particularly significant in the context of advertising to promote legal advice and related services, such as bankruptcy assistance, because of the difficulty consumers have in evaluating both the promotion and the provision of these services. The Court has recognized this difficulty on numerous occasions. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates*, 433 U.S. at 383; see *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 n.25 (noting that lawyers "do not dispense standardized products" but "render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising"). Disclosure requirements are an important part of the solution to the problem. Even when striking down

outright restrictions on advertising, the Court has emphasized that the government "retains the power to correct omissions that have the effect of presenting an inaccurate picture." *Bates*, 433 U.S. at 375. Under the First Amendment, "the preferred remedy is more disclosure, rather than less." *Ibid.*

Because of the lesser burden imposed by disclosure provisions, this Court has prescribed a standard of review less searching than the intermediate-scrutiny analysis it has applied to content prohibitions in the attorney-advertising context. The leading decision is *Zauderer*, which involved an Ohio attorney disciplined for violating a variety of bar rules related to advertising. The Court upheld a disclosure requirement analogous to Section 528, see 471 U.S. at 650-652, even as it struck down several other bar rules that affirmatively restricted speech, see *id.* at 632-633, 639.

Ohio required attorneys who advertise their willingness to represent clients for a contingency fee to include a statement concerning whether the fee arrangement would require the client to pay court costs even in the event of a loss. The Court specifically rejected the argument that the State was required to demonstrate that Zauderer's "advertisement, absent the required disclosure, would be false or deceptive," that "the disclosure requirement directly advances the relevant governmental interest," or that the requirement "constitutes the least restrictive means of doing so." 471 U.S. at 650. Such arguments, the Court explained, "overlook[] material differences between disclosure requirements and outright prohibitions on speech." *Ibid.* The Court further explained that, "in virtually all [its] commercial speech decisions" up to that point, it had "emphasized that because disclosure requirements trench much more

narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651 (quoting *R.M.J.*, 455 U.S. at 201).

Accordingly, the Court in *Zauderer* held that disclosure requirements applicable to attorney advertising need only be "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651; accord *id.* at 656 (Brennan, J., concurring in part, concurring in the judgment in part and dissenting in part) (agreeing, "[w]ith some qualifications," that "a State may impose commercial-advertising disclosure requirements" that satisfy that reasonable-relationship standard). The Court concluded that the challenged state bar rule "easily pass[ed] muster under this standard" because "[t]he State's position"—that contingent-fee advertising is deceptive if it does not clarify the client's liability for costs—was "reasonable enough to support [the disclosure] requirement." *Id.* at 652-653.

2. Petitioners fundamentally misconceive these governing principles. For example, petitioners compare (Br. 76-77) the disclosure requirements of Section 528 to the kind of forced political speech at issue in *Wooley* v. *Maynard*, 430 U.S. 705 (1977) ("Live Free or Die" motto), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (Pledge of Allegiance). "[T]he interests at stake in this case," however, are simply "not of the same order." *Zauderer*, 471 U.S. at 650-651. As in *Zauderer*, Congress in enacting Section 528 did not seek "to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" but merely prescribed what disclaimers will ensure that a particular class of "commercial advertising"

is not misleading. *Id.* at 651 (quoting *Barnette*, 319 U.S. at 642). In the latter context, the Court explained, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.*[19]

Petitioners are likewise mistaken in contending (Br. 90-94) that Section 528 must be analyzed under the framework of intermediate scrutiny set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). This Court rejected the identical argument in *Zauderer*. Although the Court applied the *Central Hudson* standard in analyzing and invalidating Ohio's affirmative restrictions on attorney advertisements (such as the State's prohibition on the use of even truthful, nonmisleading illustrations), *Zauderer*, 471 U.S. at 632-633, 639, the Court specifically declined to analyze the disclosure requirement under the same principles, explaining that there are "material differences between disclosure requirements and outright prohibitions on speech," *id.* at 650. The Court further explained that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 652 n.14. The court of appeals in this case was therefore correct in analyzing Section 528 under the

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[19] Petitioners (Br. 77, 79, 83) and amici NACBA et al. (Br. 27-28) are similarly wrong in relying on *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). The Court in *Riley* struck down a disclosure requirement outside the context of commercial advertising, while reiterating that "[p]urely commercial speech is more susceptible to compelled disclosure requirements." *Id.* at 796 & n.9 (citing *Zauderer*, *supra*).

disclosure principles discussed in *Zauderer* rather than under *Central Hudson*. See Pet. App. 18a.[20]

B. Section 528 Is A Reasonable Means Of Combating A Documented Risk Of Consumer Deception

Section 528 is a reasonable response to the problem Congress identified: advertising that promotes debt-relief services without disclosing that those services entail a bankruptcy filing and its attendant consequences. By using either the statutory disclaimer or a permissible alternative ("a substantially similar statement") in their public advertising, debt relief agencies make clear the nature of the services they are offering. Under the governing *Zauderer* standard, Section 528 is constitutional.

1. Section 528 responded to "increasingly aggressive lawyer advertising"

In hearings preceding the 2005 Act, Congress heard evidence of "increasingly aggressive lawyer advertising"

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[20] In any event, Section 528 would survive First Amendment scrutiny even under the *Central Hudson* standard. See Pet. App. 19a n.11 (citing *Olsen* v. *Gonzales*, 350 B.R. 906, 920 (D. Or. 2006), appeal pending, No. 07-35616 (9th Cir. filed July 24, 2007)). Section 528 "targets a concrete, nonspeculative harm." *Went For It*, 515 U.S. at 629. Indeed, as the court of appeals recognized, the statute is "directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy." Pet. App. 19a. The requirement of a two line disclosure does not "burden substantially more speech than necessary to further the government's legitimate interests." *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 430 (1993). Indeed, as already noted, the statute restricts no speech at all, but merely requires the disclosure of factually correct information. See *Olsen*, 350 B.R. at 921. As this Court observed in *Zauderer*, petitioners' "constitutionally protected interest in *not* providing [such] factual information in [their] advertising is minimal." 471 U.S. at 651.

for bankruptcy services that offered to make consumers' debts "disappear" but failed even to "mention bankruptcy." *2003 Hearings* 55. One retailer testified that some of his customers had been misled by such attorney advertisements and "d[id] not even understand that they ha[d] filed for bankruptcy." *1999 Hearings* 123 (statement of Michael Moore, National Retail Federation). In 1997, the Federal Trade Commission (FTC) warned that many debt-relief advertisements offering to "[w]ipe out" consumer debts, or to "[s]top credit harassment, foreclosures, [and] repossessions," regularly fail to disclose that such "relief may be spelled b-a-n-k-r-u-p-t-c-y." *1998 Hearings* Pt. III, at 90-92. The FTC observed that such advertisements have the potential to mislead consumers into filing for bankruptcy without knowledge or appreciation of the consequences. See *id.* at 92 (warning that "bankruptcy stays on your credit report for 10 years, and can hinder your ability to get credit, a job, insurance, or even a place to live").[21]

The legislative record contains sample advertisements that gave Congress ample reason for concern. Print advertisements for law firms included such large-print headlines as "Stop Worrying About Your Bills For The New Year" and "ATTENTION: TOO MUCH DEBT?!" *1998 Hearings* Pt. III, at 93, 94. Such advertisements prominently asserted that the law firm could "Consolidate and Lower Your Bills" or that "*Federal Law Provides For*: (A) Consolidation (one low monthly

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[21] An updated version of the 1997 FTC alert was issued in 2008 and remains in effect today. See Division of Consumer & Bus. Educ., FTC, *FTC Consumer Alert: Advertisements Promising Debt Relief May Be Offering Bankruptcy* (May 2008) <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt015.shtm>.

payment) (B) Liquidation (eliminate debts)." *Ibid.* References to the form of relief from debt that the firms would pursue were oblique at best, such as a star footnote referring to "U.S. Bankruptcy law," *id.* at 94, and a statement that the "forms of consolidation" include "court-assisted consolidation, like Chapter 13 bankruptcy," *id.* at 93.

Despite a legislative record extending over at least three hearings and several years, petitioners assert (Br. 92) that Congress did not identify a "substantial" interest in protecting the targets of such advertisements because the evidence did not "actually demonstrate that any consumer has been, in fact, deceived by this advertising." This Court held in *Zauderer*, however, that such a showing is not required: "When the possibility of deception is as self-evident as it is in this case, we need not require the [government] to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" 471 U.S. at 652-653 (quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965)) (alterations in original); cf. *Hersh*, 553 F.3d at 766 (noting that "the government has a compelling interest in ensuring that those who enter bankruptcy know what it entails") (citing *House Report* 4). The evidence in the legislative record was sufficient for Congress reasonably to conclude that advertisements promising debt relief while downplaying the role of bankruptcy are inherently misleading. Cf. *Zauderer*, 471 U.S. at 653.

2. Section 528 addresses the identified problem directly and flexibly

In enacting Section 528, Congress responded directly to the deceptive practices that the FTC and others had identified. Section 528 requires debt relief agencies to "disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public" that the advertised services "are with respect to bankruptcy relief under this title." 11 U.S.C. 528(a)(3). In particular, if a debt relief agency's public advertisement offers "bankruptcy assistance services" (*ibid.*), or "indicat[es] that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt" (11 U.S.C. 528(b)(2)), the advertisement must include either the statutorily approved statement ("We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.") or a "substantially similar statement." 11 U.S.C. 528(a)(4) and (b)(2)(B).

The solution that Congress devised—a two-line statement that identifies an attorney or other covered person as a "debt relief agency" under governing law and explains that the offered services include "help[ing] people file for bankruptcy relief under the Bankruptcy Code"—"is reasonably and rationally related to the government's interest in preventing the deception of consumer debtors." Pet. App. 19a. Indeed, as the court of appeals explained, Section 528 is "directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy." *Ibid.* Section 528 per-

forms the modest but important function of enabling consumers to recognize advertisements promoting bankruptcy services for what they really are.

3. The Section 528 disclosures are factual in nature and are not misleading

The disclosure requirements imposed by Section 528(a)(4) and (b)(2)(B) apply only to persons who are "debt relief agenc[ies]" within the meaning of the BAPCPA. See 11 U.S.C. 528(a) and (b)(2). The disclosures that those provisions specify—*i.e.*, "We are a debt relief agency" and "We help people file for bankruptcy relief under the Bankruptcy Code"—are factually accurate and create no potential danger that potential customers will be misled as to the functions that the advertiser performs. As in *Zauderer*, petitioners' "constitutionally protected interest in *not* providing [such] factual information in [their] advertising is minimal." 471 U.S. at 651.

a. Section 528(a)(4)'s disclosure requirements apply only to persons who are "debt relief agenc[ies]" within the meaning of Section 101(12A). As applied to such persons, the statement "We are a debt relief agency" is by definition an accurate description of the advertiser's legal status. As a matter of ordinary English usage, moreover, the term "debt relief agency" accurately describes the persons subject to the disclosure requirement. Under the BAPCPA, that term is limited to persons who provide "bankruptcy assistance to an assisted person" or who act as "bankruptcy petition preparer[s]." 11 U.S.C. 101(12A); see 11 U.S.C. 101(4A) (definition of "bankruptcy assistance"). Persons who perform those functions are naturally understood to provide "debt relief." And they are "agencies" in the accepted sense in

which that word is used to describe service-oriented businesses—*e.g.*, travel agencies, advertising agencies, employment agencies, modeling agencies, and public relations agencies.[22]

Petitioners urge (Br. 88) that consumer bankruptcy attorneys "are entitled to call themselves 'attorneys' in their advertising." As the court of appeals recognized, however, nothing in the BAPCPA prevents them from doing so. See Pet. App. 20a ("[N]othing in the Code prevents [petitioners] from identifying themselves in their advertisements as both attorneys and debt relief agencies."). In enacting Section 528, Congress has not "prevent[ed] attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650.

Relying on *R.M.J.*, *supra*, petitioners argue (Br. 88) that Section 528 is nonetheless invalid because "attorneys should not be compelled to use any label * * * other than one of their own choosing that is accurate and not deceptive." *R.M.J.*, however, involved a *prohibition* on attorneys' using any phrase other than those on an approved list to describe their legal practice. 455 U.S. at 194-196. Here, by contrast, petitioners are free to advertise their practice in any manner they please, pro-

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[22] Amici NACBA et al. contend (Br. 26), based on a declaration submitted in other litigation by an NACBA member, that potential clients have expressed concern that a "debt relief agency" might be thought a government agency. As the record in that case shows, the author of that declaration bears considerable responsibility for the problem he encountered, as he advertised on his website that he has been "designated as a Federal Debt Relief Agency by an Act of Congress and the President of the United States." C.A. App. at 62, *Connecticut Bar Ass'n* v. *United States*, No. 08-4797-cv (2d Cir. argued Sept. 24, 2009).

vided they also comply with the basic disclosure requirements in Section 528.[23]

b. Petitioners do not dispute the accuracy of the second half of the statutory disclaimer, *i.e.*, that the person sponsoring the advertisement "help[s] people file for bankruptcy relief under the Bankruptcy Code." See Pet. Br. 87 (asserting that petitioners already mention bankruptcy in their advertising). Rather, they contend that the statement is required even in contexts in which it does not serve the core congressional purpose; they speculate, for example, that some law firms will be debt relief agencies by virtue of representing debtors, but will also wish to advertise to creditors that they perform services listed in Section 528(b)(2). But even as applied to that hypothetical and presumably narrow class, the required disclaimer is not misleading, much less inaccurate.[24] In these circumstances, it simply provides some extraneous information.

Petitioner's argument suggests, at most, that Section 528's purposes could have been achieved had Congress defined somewhat more narrowly the category of advertisements for which the specified disclosures are required. But as the Court held in *Zauderer*, the standard of review in this context is not whether the statute is

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[23] Petitioners have not asserted that the requirement to include the short disclaimer in their advertising is burdensome for reasons other than the content of the disclaimer. Cf. *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-147 & n.11 (1994) (disclaimer required to accompany the term "specialist" was so unduly detailed that no one would use it on a business card or letterhead, thus effectively prohibiting the use of the term "specialist" in those contexts).

[24] The record does not reflect that petitioners themselves advertise any legal services beyond representing debtors in bankruptcy. See J.A. 38a-39a.

narrowly tailored, but only whether it is "reasonably related to the State's interest"—here (as in *Zauderer*) the interest in preventing deception of consumers. See 471 U.S. at 651 n.14 ("reject[ing] [the] contention that [the Court] should subject disclosure requirements to a strict 'least restrictive means' analysis," because disclosure requirements are themselves less restrictive than other regulations); see also *Went For It*, 515 U.S. at 632 ("[T]he 'least restrictive means' test has no role in the commercial speech context.").

Moreover, Congress had valid reasons for making the disclosure requirement contingent on the content of the advertisement rather than on the advertiser's own characterization of the target audience. Advertisements frequently tout more than one service, see, *e.g.*, *1998 Hearings* Pt. III, at 95 (advertisement for bankruptcy, divorce, and personal injury representation), and the advertiser has only limited ability to choose or predict in advance who will see its communications. Congress reasonably concluded that advertisements offering "assistance with respect to * * * mortgage foreclosures [or] eviction proceedings," 11 U.S.C. 528(b)(2), may well implicate the same interests as advertisements promoting debt relief, because consumers desperate to stave off foreclosure or eviction may be attracted by the automatic stay of proceedings that a bankruptcy filing triggers. See *1998 Hearings* Pt. III, at 92 (FTC alert noting that ads may promote the ability to "'STOP credit harassment [or] foreclosures'" or to "'Keep Your Property.'"). In any event, law firms and other entities that do not provide bankruptcy assistance services to assisted persons for compensation are not "debt relief agenc[ies]" and therefore are not covered by Section 528; that threshold eligibility determination will rule out

many of petitioners' hypothetical applications to creditors' counsel.[25]

4. By its terms, Section 528 permits debt relief agencies to alter the wording of the required disclosures

Quibbles over the fit between the statutory disclaimer language and particular hypothetical situations are ultimately not relevant in this pre-enforcement challenge, which asserts that Section 528's disclaimer requirements are unconstitutional as applied to *all* attorneys. And if the statutory disclosures inaccurately describe the services that a particular debt relief agency performs, Section 528 establishes a mechanism by which the inaccuracy can be avoided. Any "substantially similar statement" may be substituted for the language set out in the statute. 11 U.S.C. 528(a)(4) and (b)(2)(B). Thus, if a particular debt relief agency engages in the type of public advertising that triggers the disclosure requirements (see 11 U.S.C. 528(a)(3) and (b)(2)), but nevertheless avoids ever "help[ing] people file for bankruptcy relief under the Bankruptcy Code," that debt relief agency presumably could tailor the disclaimer that it would include in its advertisements. The statutory option to customize the disclaimer further ameliorates any concern about the requirement's potential applications to hypothetical outlier cases.

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[25] As explained above, a creditor is not an "assisted person," and representing creditors does not make an attorney a "debt relief agency." See pp. 22-24, *supra*. The assertion by amici NACBA et al. (Br. 28-30) that the disclaimer is "affirmatively false" rests on the misreading of "assisted person" as including creditors.

C. Petitioners Cannot Avoid Section 528's Disclosure Requirements By Asserting That Their Own Advertising Is Not Deceptive

Petitioners contend (Br. 87) that Section 528(a)(4) and (b)(2)(B) are unconstitutional as applied to their own advertising because that advertising is not deceptive and therefore does not raise the concerns that prompted Congress to act.[26] That assertion has no support in the record. Petitioners brought this action as a pre-enforcement challenge to Section 528, and they did not submit any past or future advertisements into evidence. Neither their petition for a writ of certiorari nor their brief in the court of appeals advanced the theory that they are entitled to an as-applied exemption from Section 528(a)(4) and (b)(2)(B) based on the non-deceptive content of their own prior advertising. See Pet. 22-30; Pet. C.A. Br. 41-50.

In any event, the Court in *Zauderer* specifically rejected the contention that the disclosure requirement challenged in that case would be unconstitutional unless the particular "advertisement, absent the required disclosure, would be false or deceptive." 471 U.S. at 650. To combat the deceptive practices of attorneys who promote the benefits of bankruptcy relief without the necessary explanation, Congress required all debt relief agencies who engage in specified forms of public advertising to comply with the basic disclosure requirements of Section 528(a)(4) and (b)(2)(B). That legislative judgment

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[26] Petitioners assert that they "do not state in their advertisements that they can 'wipe out' unpaid bills, make debts 'disappear,' or 'stop credit harassment, foreclosures, or repossessions' *without mentioning that these things are accomplished through bankruptcy*," and that their advertisements "specifically mention 'bankruptcy' multiple times." Br. 87 (emphasis added).

is both reasonable and consistent with the First Amendment.[27]

The as-applied challenge that petitioners belatedly assert is especially ill-conceived because Section 528 allows regulated parties to substitute a "substantially similar statement" for the statement that the advertiser "help[s] people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. 528(a)(4) and (b)(2)(B). See p. 68, *supra*. If the references to bankruptcy in petitioners' advertisements are suitably prominent (unlike, for example, the use of a star footnote in the advertisement appearing in the legislative history, see p. 62, *supra*), then petitioners may be able to satisfy Section 528's requirements with only modest changes to their advertising, or even none at all. Petitioners' new as-applied challenge logically depends on the proposition that their own advertisements contain references to bankruptcy that are clear enough to satisfy Congress's concerns, but are not "substantially similar" to the statement that petitioners "help people file for bankruptcy relief under the Bankruptcy Code." Petitioners have not suggested what such advertisements would look like, let alone shown that their own advertisements fall within this hypothetical category. And they assuredly have not shown how adopting the Section 528 formulation or "a substantially similar statement" would meaningfully curtail their ability to advertise their services. This Court therefore should uphold the statutory disclosure requirements.

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[27] This Court also granted certiorari on the question whether Section 528 violates the Due Process Clause. 08-1119 Pet. ii. Petitioners have not separately argued that issue and have accordingly abandoned it.

CONCLUSION

The judgment of the court of appeals should be reversed as to Section 526(a)(4) and in all other respects affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 11 U.S.C. 101 provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

* * * * *

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

* * * * *

2. 11 U.S.C. 110 provides in pertinent part:

Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section—

(1) "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attor-

ney, who prepares for compensation a document for filing; and

(2) "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

* * * * *

(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

(2)(A) A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

(B) The legal advice referred to in subparagraph (A) includes advising the debtor—

(i) whether—

(I) to file a petition under this title; or

(II) commencing a case under chapter 7, 11, 12, or 13 is appropriate;

(ii) whether the debtor's debts will be discharged in a case under this title;

(iii) whether the debtor will be able to retain the debtor's home, car, or other property after commencing a case under this title;

(iv) concerning—

(I) the tax consequences of a case brought under this title; or

(II) the dischargeability of tax claims;

(v) whether the debtor may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;

(vi) concerning how to characterize the nature of the debtor's interests in property or the debtor's debts; or

(vii) concerning bankruptcy procedures and rights.

* * * * *

3. 11 U.S.C. 526 provides:

Restrictions on debt relief agencies

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under

Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

4. 11 U.S.C. 528 provides:

Requirements for debt relief agencies

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b)(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes—

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall—

(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and

(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

5. 11 U.S.C. 707 provides in pertinent part:

Dismissal of a case or conversion to a case under chapter 11 or 13

* * * * *

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or

(II) $10,000.

(ii)(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chroni-

cally ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documenta-

tion of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

* * * * *

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

* * * * *

REPLY BRIEF

Supreme Court, U.S.
NOV 2009
OFFICE OF THE CLERK

Nos. 08-1119, 08-1225

IN THE

Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether, with due regard for the canon of constitutional avoidance, the phrase "debt relief agency," defined in 11 U.S.C. §101(12A), excludes "attorney."

2. Whether 11 U.S.C. §526(a)(4), prohibiting an attorney from advising a client to incur debt in contemplation of bankruptcy or to pay an attorney, violates the First Amendment's guarantee of free speech.

3. Whether 11 U.S.C. §526(a)(4) may be construed narrowly, and, when construed narrowly, whether it is unconstitutionally vague.

4. Whether 11 U.S.C. §528 improperly restrains commercial speech by requiring mandatory, misleading disclosures in an attorney's truthful, non-deceptive advertising in violation of the First Amendment's guarantee of free speech.

5. Whether 11 U.S.C. §528, requiring mandatory, misleading disclosures in an attorney's truthful, non-deceptive advertising, violates Fifth Amendment Due Process.

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ARGUMENT

I. The Phrase "Debt Relief Agency" Does Not Include Attorneys.

Section 101(12A) defines the phrase "debt relief agency" to mean a person who provides "bankruptcy assistance" to an "assisted person." 11 U.S.C. §101(12A). The phrase does not expressly reference "attorneys" and, contrary to the Government's assertion, the text, legislative history, and purpose of the statute do not demonstrate any "clear" intent to include "attorneys" within its scope.

The legislative reports accompanying an early version of the text of section 101(12A) indicated that the proposed phrase "debt relief *counselling* [sic] agency" would include "attorneys." Before passing the legislation in 2005, however, Congress amended the proposed text in 1999 to delete the word "counselling," and thereafter *dropped* any reference to "attorneys" in the 2001, 2003, and 2005 legislative reports explaining the meaning of the amended phrase. If anything, these legislative moves support the conclusion that Congress did *not* intend to include attorneys within the scope of "debt relief agency."

Also contrary to the Government's argument, the legislative record does not otherwise unambiguously demonstrate that Congress intended to

address "abuse" by "attorneys." The Government references a study cited in one house report and the statement of a creditor who testified at a hearing. Gov't Br. 21. Neither reference, however, establishes a significant pattern of bankruptcy abuse generally, let alone specific abuse by attorneys. In contrast, the report that Congress commissioned prior to the 2005 amendments to review the bankruptcy system concluded that most bankruptcy filings are not abusive. *See Bankruptcy: The Next Twenty Years*, National Bankruptcy Review Commission Final Report 83 (Oct. 20, 1997); *see also* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong. 11 (1973).

The Government points out that, as a textual matter, "attorneys" are not specifically "excepted" from the definition of "debt relief agency." Gov't Br. 11. This observation, however, merely begs the threshold question of whether they are fairly included within the scope of the defined term in the first place. The Government contends that "attorneys" must be included because the term "bankruptcy assistance" referenced in the definition of "debt relief agency" includes functions that attorneys perform, such as "legal representation." *Id.* Contrary to the Government's suggestion, the term "bankruptcy assistance" is not defined in straightforward fashion to mean "legal represen-

tation." It is defined in a convoluted manner to mean "any goods or services sold or otherwise provided...with the express or implied purpose of providing" information, advice, or a variety of other services related to bankruptcy, including "legal representation." 11 U.S.C. §101(4A). This convoluted definition is an oddity that demands a more exacting explanation than the simplistic one the Government offers. Consistent with the statute's text, apparent purpose, and other indicators, the phrases "debt relief agency" and "bankruptcy assistance" most naturally encompass persons who are non-lawyers but who nonetheless either provide services that are similar to those that attorneys provide in the bankruptcy context–such as bankruptcy petition preparers–or who engage in the unauthorized practice of law.

Resisting this conclusion, the Government argues that the phrase "debt relief agency" must include attorneys because otherwise the various salutary regulations mandated in sections 526, 527, and 528–including those that are not challenged here–would not apply to attorneys. Gov't Br. 27 (e.g., debt relief agencies must not fail to provide promised services and must advise their clients about the requirements of obtaining bankruptcy relief). The Government's concern is misplaced. As applied to attorneys, these provisions essentially duplicate already existing state law requirements. *See* Pet. Br. 44-45 (outlining

state law requirements). The same cannot be said, of course, for non-attorneys who are not subject to the same state regulations, but who nonetheless provide "bankruptcy assistance." To avoid confusing regulatory redundancy, the most plausible interpretation of the statutory scheme is that Congress sought to impose its requirements on those who were not already regulated in a comprehensive way–i.e., non-lawyers who provide "bankruptcy assistance" to "assisted persons."

Contrary to the Government's position, this case is an ideal candidate for application of the rule that, before the Court will accept an interpretation of a statute that trenches seriously on an area of traditional state regulation, it will require that Congress' expression of its intent be "clear and manifest." Pet. Br. 12-13. The Government does not deny that the regulation of the legal profession is an area traditionally reserved to the States. Moreover, the Government's argument that Congress has occasionally enacted laws that regulate bankruptcy lawyers misses the point. Gov't Br. 24-25. In those laws, Congress expressly directed its regulations to "attorneys." *See, e.g.*, 11 U.S.C. §329. Consistent with this convention, if Congress had intended the phrase "debt relief agency" to include "attorneys," it naturally would have said so expressly in section 101(12A). It did not. Further, the other laws the Government invokes do not con-

flict with state requirements regulating the legal profession; the ones at issue here do.

This case also presents an ideal candidate for application of the "cardinal" principle that, if "fairly possible," the Court will construe a statute to avoid addressing its constitutionality. The Government argues that this canon does not apply on the theory that, once again, it is "clear" from the text, legislative history, and purpose of the relevant statutory provisions that Congress intended to include attorneys within the scope of "debt relief agency." Gov't Br. 26. The Government's use of the term "clear" is surely in error. Indeed, all things considered, the more plausible interpretation of the statute is that Congress did *not* intend the term "debt relief agency" to encompass "attorney."

Also unpersuasive is the Government's assertion that avoiding the constitutional issues raised here would only postpone them for a future case. The Court's precedents reveal that the Government's argument is no reason to disregard the canon; the Court has previously avoided questions that might arise in the future. Further, the Government does not identify any potential case involving non-lawyers looming on the horizon and, as a practical matter, one may never arise. In this instance, the Court may conclude that attorneys are not included within the scope of section 101(12A) to avoid confronting

the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B). On the other hand, as discussed more fully below, if the Court finds that these statutes violate the First Amendment, it should conclude that they are unconstitutional.

A. The Phrase "Debt Relief Agency" Is Best Construed to Exclude Attorneys.

The Government does not deny the oddity of labeling attorneys "debt relief agencies." No attorney would ever voluntarily refer to himself in this awkward and misleading way. Nor would any client naturally think to seek legal counsel from such an entity. The Government's interpretation of the phrase as "clearly" including attorneys is thus facially suspect. It is further problematic because including attorneys within the scope of the phrase generates effects at odds with the overall statutory scheme.

When Congress amended the Bankruptcy Code in 2005, it increased significantly the cost and complexity of ordinary bankruptcy proceedings. Now more than ever, debtors require the counsel of skilled bankruptcy lawyers to help them navigate the process. Yet under the Government's interpretation of the phrase "debt relief agency," skilled attorneys would be *discouraged* from providing this assistance because of

the restrictions and burdens that the Code now places on "debt relief agencies."

This effect is not hypothetical. One bar association report states that, because some courts have interpreted the phrase "debt relief agency" to include "attorneys," "[m]any lawyers have stopped providing advice or representing individuals in bankruptcy matters entirely rather than render legal advice under these restrictions and risk incurring...undue regulatory interference..." ABA 2009 Report with Recommendation #10B at 5 (Policy adopted Aug. 2009), *available at* http://www.abanet.org/leadership/2009/annual/daily_journal/Ten_B.pdf. The report concludes that this has had "a serious negative impact on the availability of legal counsel in bankruptcy-related matters." *Id.*; *see also* Andrew P. MacArthur, *Pay To Play: The Poor's Problems in the BAPCPA*, 25 Emory Bankr. Dev. J. 407, 483 (2009) ("The BAPCPA harms the poor both procedurally and substantively. The additional fees and increased paperwork it requires, combined with its tendency to reduce the number of available attorneys, make it more difficult for the poor to access the bankruptcy system.").

The Government's interpretation is thus implausible. Absent the clearest textual directive, it should not be presumed that, at the same time Congress increased the need for skilled legal representation in bankruptcy cases in order to "pro-

tect" consumer debtors, it simultaneously greatly diminished the ability of these debtors to obtain it. For this reason, as well as all the others stated in petitioners' opening brief, if Congress had intended to include "attorneys" within the scope of "debt relief agency," it surely would have mentioned "attorneys" somewhere in the statutory text. The fact that Congress did not do so should be taken to mean that it did not intend the inclusion.

The Government contends that the absence of the word "attorney" from the definition of "debt relief agency" is immaterial in light of other textual indications that Congress meant to include attorneys. Gov't Br. 18. Among other flaws, this argument ignores the fact that Congress added the defined term "attorney" as part of the same amendments that added the defined phrase "debt relief agency" to the Code, and that Congress carefully and expressly chose to include another defined term, "bankruptcy petition preparer," within the scope of "debt relief agency," but did not do so with respect to "attorneys." Presumably, had Congress intended to include attorneys under this definition, it would have been at least as careful in doing so as it was with bankruptcy petition preparers.

The Government cites two cases where attorneys were found to be included in statutes that did not expressly mention them. Gov't Br.

18-19. Neither case, however, involved the anomalies that such inclusion presents in this case, nor questions of constitutional dimension. In addition, both cases involved evidence of congressional intent to include attorneys not present here.

For example, in *Heintz v. Jenkins*, the Court concluded that attorneys who collect debts through litigation could be "debt collectors" under the Fair Debt Collection Practices Act. 514 U.S. 291 (1995). In that case, however, Congress had repealed a provision in an earlier version of the statute that had expressly *excluded* attorneys from the definition of "debt collectors." By implication, the repeal of the exclusion suggested Congress' intent to include attorneys. *Id.* at 294-95. In this case, there is no similar legislative signal demonstrating Congress' intent to include attorneys. In fact, the *opposite* signal exists.

As noted, when Congress considered amending the Bankruptcy Code in 1998, it proposed adding the defined phrase "debt relief *counselling* [sic] agency" to section 101. H.R. 3150, 105th Cong. §113(a)(3) (1998) (emphasis supplied). The house report accompanying this proposed legislation explained that the phrase "debt relief *counselling* agency" would apply "to attorneys as well as to non-attorneys, such as petition preparers." H.R. REP. No. 105-540, at 77 (1998). Subsequently, however, in 1999, Congress

amended the proposed text to delete the word "counselling," leaving the phrase as it is currently formulated: "debt relief agency." 11 U.S.C. §101(12A). Thereafter, in explaining the meaning of the amended phrase "debt relief agency," each of the 2001, 2003, and 2005 house reports *omitted any explicit reference to "attorneys,"* but maintained an explicit reference to "bankruptcy petition preparer[s]." *See* H.R. REP. No. 107-3, at 42 (2001) ("Section 226(a)(3) defines a 'debt relief agency' as any person (including a bankruptcy petition preparer) who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration."); H.R. REP. No. 108-40, at 174 (2003) (same); *and* H.R. REP. No. 109-31, at 65 (2005) (same).

These legislative moves are significant. The amendment of the text, together with the express omission of attorneys in the subsequent accompanying explanatory legislative reports in 2001, 2003, and 2005, suggests that Congress did not intend the amended phrase to include what it omitted–attorneys.

The Government argues that if Congress had intended to exclude attorneys from the scope of "debt relief agency," Congress would have listed "attorneys" among the various exceptions in the definition of the phrase. Gov't Br. 19. The Government, however, misapprehends the nature of

the exceptions delineated in the statute and what these exceptions reveal. As the Government concedes, the officers and directors of a law firm organized as a corporation would find shelter under the enumerated exceptions, but the partners of a law firm organized as a partnership would not. Gov't Br. 20 n.7. It is clear that Congress understood that law firms are often organized as partnerships. 11 U.S.C. §101(4). Moreover, corporations act through their officers and directors no more or less than partnerships act through their partners. There is no plausible reason why Congress would have provided shelter for the former but not the latter, other than that Congress did not intend debt relief agencies to encompass attorneys. Among other things, it makes no sense that a partner in a law firm who never personally provides "bankruptcy assistance" to an "assisted person" nonetheless may be a "debt relief agency," but an officer of a corporation responsible for directing the corporation's affairs cannot be.

The statute also excludes from the scope of "debt relief agency" a "creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor." 11 U.S.C. §101(12A)(C). Attorneys assisting debtors in bankruptcy often become creditors of the debtor as legal fees accrue and, thus, would often fall under this exception, at least in the chapter

13 context. The Government attempts to diminish this anomaly by contending that, for example, the exception applies to an attorney who provides assistance in a divorce "acting solely in her capacity as a creditor" and is therefore not subject to the requirements of debt relief agencies. Gov't. Br. 20. But an attorney providing merely divorce representation would not be providing "bankruptcy assistance" in the first place and, thus, would not be subject to the requirements of a debt relief agency. The exemption would be entirely superfluous if it applied only in the manner the Government advocates.

Contrary to the Government's contentions, reading the phrase "debt relief agency" to include attorneys would otherwise lead to absurd results. As discussed in petitioner's opening brief, including attorneys as debt relief agencies would prevent attorneys from legitimately advising a client to incur debt where such advice would be in the client's best interest and would condition the kind of advice that attorneys could give debtors on the client's relative wealth. Pet. Br. 26-27. Further, because the definition of "assisted person" is broadly defined to encompass any client "whose debts consist primarily of consumer debts and the value of whose non-exempt property is less than" the statutorily defined minimum, including attorneys as debt relief agencies would require attorneys who represent creditors that qualify as "assisted persons" to misrepre-

sent that they "help people file for bankruptcy relief." 11 U.S.C. §101(3); 11 U.S.C. §528(a).

The Government argues that creditors are not "assisted persons" on the theory that creditors do not hold "exempt" property. Gov't Br. 22. The Government is mistaken. Property may be "exempt" either under the Bankruptcy Code or, more commonly, under applicable state law. The Code expressly recognizes this. 11 U.S.C. §522(b)(3). Further, "creditors" who hold claims against a particular debtor are also frequently "debtors" with respect to their *own* creditors. The Government's semantic argument is unsound and finds no shelter in the text of the statute.

In order to avoid the anomalies that petitioners identify, the Government purports to establish the "plain" meaning of the text by selectively rewriting its provisions. The statute, however, cannot bear the weight of the Government's gloss.

B. Treating Attorneys as Debt Relief Agencies Would Intrude on a Traditional Area of State Regulation and Congress' Intent To Do So Is Not "Clear and Manifest."

The regulation of attorneys falls within the traditional domain of State sovereignty. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). Where, as here, the Government argues that Congress intended to intrude into such an area, the Government must point to a congressional intent that is "clear and manifest." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543-44, 546 (1994) ("[W]here the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation"); *see also Kelly v. Robinson*, 479 U.S. 36, 49 (1986) ("when the Federal Government...radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947)).

The Government contends that "there is nothing improper or unusual in Congress' decision in BAPCPA to regulate attorney conduct that threatens the integrity of the bankruptcy system." Gov't Br. 25. This assertion, however,

is once again question-begging and beside the point. Absent a clear statement of Congress' intent, courts will not presume that Congress has actually elected to regulate the profession.[1] The 2005 amendments to the Code do not provide the "explicit" intent necessary to infringe on the States' traditional power to regulate attorneys.

C. The Canon of Constitutional Avoidance Should Be Applied to Exclude Attorneys from the Definition of Debt Relief Agencies.

The Government contends that the canon of constitutional avoidance should be used only to choose between competing permissible constructions of a statute, and not to adopt "a construction that the statute unambiguously precludes." Gov't Br. 26. The Government's premise–that the statute unambiguously precludes petitioner's interpretation–is flawed. In truth, it is "fairly possible" to construe the statute as excluding attorneys from the scope of debt relief agencies, and thus, Congress has not "foreclosed peti-

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[1] Likewise, the Government's reliance on Section 526(d)(1) is misplaced. Even if the 2005 amendments do not "bar the States from regulating attorney conduct," Gov't Br. at 24, it is still an intrusion in an area traditionally left to the States. As such, a "clear and manifest" congressional intent to intrude is required.

tioner's purported saving construction," as the Government maintains. Gov't Br. 26.

The Government argues that the canon of constitutional avoidance is inapplicable here because excluding attorneys as debt relief agencies would not eliminate the constitutional issues that might still confront non-attorneys. Gov't Br. 27. The Court's precedents demonstrate, however, that the Court may apply the canon even if other constitutional questions may remain or may arise at a later time. For example, in *Northwest Austin Mun. Util. Dist. Number One v. Holder*, a municipal utility district in Texas challenged section 5 of the Voting Rights Act, which requires all changes in state election procedures to be approved by a three-judge panel in the federal district court in Washington, D.C. if the body seeking to make the changes is in a state that falls within certain criteria, based on historical data as to voter registration and turnout. 129 S. Ct. 2504, 2509 (2009); 42 U.S.C. §1973c(a). The utility district applied for an exemption from the requirements but was denied when the district court found that an exemption was only available to states or political subdivisions, and that the utility district was neither. *Id.* at 2510. The utility district then sought a determination that it was eligible for an exemption or, in the alternative, that the statute was unconstitutional.

The Court noted that the constitutionality of the statute was questionable in that it "imposes substantial federalism costs" and that "[s]ome of the conditions that [it] relied upon in upholding [the] statutory scheme in [prior cases] [had] unquestionably improved." *Id.* at 2511 (internal quotations and citations omitted). Rather than decide these issues, however, the Court applied the canon of constitutional avoidance and ruled that the utility district was eligible for the exemption. *Id.* at 2516-17 ("Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.").

Further, the Government contends that petitioner's construction would undermine the intent of Congress to establish "professional standards for attorneys and others who assist consumer debtors with their bankruptcy cases" by exempting attorneys from all provisions of the 2005 amendments, even those that present no constitutional questions. Gov't Br. 27. The Government gives as examples section 526(a)(1), which requires debt relief agencies to perform all services they promise to undertake, and section 527(a)(2), which requires debt relief agencies to make certain disclosures to debtors with regard to the bankruptcy process.

The Government's contention ignores the fact that attorneys are already subject to state-established ethical standards that are inapplicable to non-attorney debt relief agencies. Attorneys are already required to give their clients competent and diligent representation and to communicate to clients all information necessary to make fully informed decisions; thus, applying section 526(a)(1) and 527(a)(2) to attorneys is duplicative and unnecessary. *See* Model Rules of Prof'l Conduct R. 1.1 (2009) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *id.* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

II. If "Debt Relief Agency" Includes Attorneys, Section 526(a)(4) Is Unconstitutional.

Both courts below concluded correctly that section 526(a)(4) violates the First Amendment for two separate reasons: (1) the provision is

substantially overbroad because it proscribes a substantial amount of good faith advice; and (2) the provision is a content-based speech restriction that does not withstand strict scrutiny. The Government's arguments do not undermine either of those conclusions. Accordingly, the Eighth Circuit's holding that section 526(a)(4) is unconstitutional should be affirmed.

A. Section 526(a)(4) Is Unconstitutionally Overbroad Because It Proscribes a Substantial Amount of Good Faith Advice to "Incur Additional Debt."

By its terms, section 526(a)(4) proscribes a substantial amount of good faith advice regarding the incurrence of debt and how to pay for an attorney and is therefore substantially overbroad. The Government maintains that section 526(a)(4)'s prohibition should be given a "narrowing construction," but the Government's interpretation is not supported by the text of section 526(a)(4), its structure or legislative history, or the historical meaning of the "in contemplation of" phrase. Tellingly, the Government itself cannot come up with a consistent narrowing formulation—as discussed more fully below, its brief suggests no less than three separate alternatives. *Compare* Gov't Br. 28 *with id.* at 32 *and id.* at 38. In addition, the "in contemplation of" phrase modifies only half the provision (i.e., the "incur debt" portion, but not the "pay an attor-

ney" portion) and, thus, cannot possibly save the entirety of the statute from unconstitutionality. Accordingly, even if section 526(a)(4) applies to attorneys (which it does not), the Court should still reject the Government's insupportable narrowing attempt and hold that section 526(a)(4) violates the First Amendment.

1. The plain language of section 526(a)(4) broadly applies to a substantial amount of good faith advice.

The Eighth Circuit held correctly that section 526(a)(4)'s prohibition applies "broadly" to good faith advice, and that its "blanket prohibition" is "substantially overbroad." Pet. App. A-29, A-32; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 793 (8th Cir. 2008). The Government does not directly address the broad ambit of section 526(a)(4)'s plain language. Although the Government claims that the section does not proscribe a "substantial" amount of protected speech, Gov't Br. 54, it does so only by ignoring both petitioners' examples and the plain sweep of the statutory provision in favor of advancing its insupportable "narrowing construction."

By its plain terms, section 526(a)(4) prohibits *any* advice "to an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a" bankruptcy case "or

to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under" title 11 of the U.S. Code. Nothing in section 526(a)(4) permits (or even suggests) an interpretation that would render the prohibition applicable to only *some* kinds of advice.

Similarly, nothing in the Government's brief undermines petitioners' argument that if Congress had intended to curb only "abusive" advice, it could and would have done so expressly, and would not have relied on the "in contemplation of" phrase to fill any perceived gaps. For example, section 329 of the Bankruptcy Code regulates certain payments to an attorney for services rendered "in contemplation of" bankruptcy. 11 U.S.C. §329. Critically, section 329 does not rely on the neutral phrase "in contemplation of" appearing in the provision to establish what the statute proscribes. Rather, it explicitly and separately provides for the cancellation or disgorgement of excessive compensation. 11 U.S.C. §329(b). The neutral phrase "in contemplation of" simply cannot carry the weight the Government would have it bear.

2. Section 526(a)(4) is not susceptible to a "narrowing construction" based on "historical" analysis.

Leapfrogging the issue of *plain* meaning, the Government seeks refuge in what it characterizes as the *historical* meaning of the "in contemplation of" phrase. The historical meaning the Government attributes to the phrase, however, is not supported by the authority upon which it relies.

The Government begins with *Black's Law Dictionary*. Gov't Br. 29. It focuses upon the eighth edition's statement that the phrase "contemplation of bankruptcy" is "*often coupled with* action designed to thwart the distribution of assets in a bankruptcy proceeding." *Id.* (quoting *Black's Law Dictionary* 336 (8th ed. 2004)) (emphasis altered). This statement in and of itself is fatal to the Government's point. As demonstrated in petitioners' opening brief, when Congress intends the neutral "in contemplation of" phrase to be associated with some kind of proscribed conduct, it identifies the proscribed conduct *expressly and independently* from the neutral "in contemplation of" phrase. Pet. Br. 62-63. Uncoupled from explicitly proscribed abusive conduct, the "in contemplation of" phrase simply has no independent proscriptive content, and certainly the Government does not demonstrate

that it does or what, exactly, the prospective content might be.

The Government's own examples drawn from various legislative histories illustrate this point.[2] For example, the Government cites the phrase "'*loading up*' in contemplation of bankruptcy," and "*a credit buying spree* in contemplation of bankruptcy." Gov't Br. 30 (emphasis supplied). It is, of course, the phrases "loading up" and "credit buying spree" that suggest abusive intent. By itself, engaging in some activity merely "in contemplation of" bankruptcy–e.g., hiring a bankruptcy attorney; filling out forms; moving into a less expensive home–suggests nothing nefarious.

The historical cases that the Government cites likewise do not establish the gloss the Government wishes to superimpose on the "in contemplation of" phrase. For example, in *Buckingham v. McLean*, this Court stated, in construing section 2 of the Bankruptcy Act of 1841, that "there is no ground upon which this act can be deemed fraudulent unless it was done in contemplation of bankruptcy *and with intent to give*

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[2] It is important to note that the Government's examples are drawn from random references to scattered legislative histories of acts that are not at issue in this case, and that the legislative history of the 2005 amendments contains no use nor explanation of the term "in contemplation of."

a preference..." 54 U.S. 151, 171 (1851) (emphasis supplied). Once again, the proscribed abusive conduct–intent to give a preference–was stated expressly and separately from the "in contemplation of" phrase. *See also Jones v. Howland*, 49 Mass. 377, 385 (1844). If it were self-evident that the phrase "in contemplation of" meant some self-evidently improper conduct, the Court's addition of the qualifier "and with an intent to give a preference" would have been unnecessary. Only with the addition of that qualifier can the abusive conduct be identified.

Likewise, in *In re Pearce*, the court held that a fraudulent transfer was one in which

> the debtor, in making the transfer, though he did it voluntarily and while in fact insolvent, acted in contemplation of bankruptcy, that is, in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects*, which takes place under a proceeding in bankruptcy.

19 F. Cas. 50, 53 (D. Vt. 1843) (emphasis supplied). Here, too, the "in contemplation of" element is insufficient on its own to convey the abusive nature of the transaction, requiring addi-

tional explanation.[3] The same is true of *Fidgeon v. Sharpe*, 128 Eng. Rep. 800, 803 (CCP 1814) ("The rule appears to me to be this: any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view to give a preference to a particular creditor, is void.") (internal quotations omitted).

Finally, the Government fails to refute petitioners' argument concerning *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933), which considered the meaning of the "in contemplation of" phrase under the prior Bankruptcy Act. The Government mostly buries its discussion of *Pender* in a footnote and insists that *Pender* demonstrates the equivalence of "in contemplation of" with "abuse." *See* Gov't Br. 32 n.9. *Pender*, however, says nothing of the sort. The fact that the Court sustained the disgorgement of an excessive payment that was made "in contemplation of bankruptcy" is, of course, neither here nor there. The payment was not abusive simply be-

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[3] Likewise, the section at issue in many of the cases the Government cites—section 2 of the Bankruptcy Act of 1841—did not use the "in contemplation of" phrase in isolation. Instead, it proscribed in relevant part payments "made or given by any bankrupt in contemplation of bankruptcy and for the purpose of giving any...person, any preference or priority over the general creditors of such bankrupts." Act of Aug. 19, 1841, ch. 9, §2, 5 Stat. 442 (repealed 1843).

cause it was made "in contemplation of" bankruptcy. It was abusive because it was excessive.[4]

3. The Government's proffered legislative history does not supply a means to "narrow" the scope of section 526(a)(4) to "abusive" advice of some kind, but rather demonstrates the implausibility of the Government's construction.

As noted, the Government offers examples of the use of the "in contemplation of" phrase in legislative histories in support of its narrowing exercise. Gov't Br. 34. As also noted, however, one problem with these examples is that they are not drawn from the legislative history of section 526(a)(4). It is thus difficult to understand how these examples have any bearing on the statutory provision at issue in this case.

Attempting to overcome this obstacle, the Government urges that "Congress has long been

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[4] The Government argues that *Pender* dealt with "a means of combating the same sort of preferential conveyances" as in the other cases it cites. Gov't Br. 32, n. 9. As the Court itself explained, however, *Pender* was not a preference case because the "class of cases to which" section 60d of the Bankruptcy Act "refers is *not* that of preferences or of fraudulent conveyances." *Pender*, 289 U.S. at 475 (emphasis supplied); *see also In re Wood*, 210 U.S. 246, 253 (1908).

aware" of the possibility of bankruptcy abuse. Gov't Br. 33. Building on this truism, the Government then acknowledges that "Congress has enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections." Gov't Br. 34; *see also id.* at 34-35 (citing 11 U.S.C. §§523(a)(2)(A); 523(a)(2)(C); 707(b)). This admission, however, proves too much. Congress' explicit prohibition of specific kinds of "abuse" in other sections of the Code, but not in section 526(a)(4), demonstrates that Congress knows how to be explicit in identifying "abuse" when it wants to and, by implication, did not wish to limit the prohibition in section 526(a)(4) to "abusive" advice.

The Government contends that, prior to the 2005 amendments, the Code "had not adequately restricted the ability of debtors" to engage in abuse, and that Congress therefore adopted the amendments to achieve its unfinished goals. Gov't Br. 35. Once again, however, the "evidence" the Government offers in support of that proposition consists merely of amendments to *pre-existing* anti-abuse provisions, along with the newly adopted "means test." *See id.* at 35-37. Glaringly absent is any legislative history that directly elucidates Congress' intent in enacting section 526(a)(4). In truth, the legislative history offers no support for the Government's effort to "narrow" the provision.

4. The Government's contextual argument does not support its "narrowing construction."

The Government makes the contextual argument that, because the three preceding subsections of 526(a) "are clearly designed to protect debtors from abusive practices by their attorneys," section 526(a)(4) should be similarly construed. Gov't Br. 39. Problematically, however, none of section 526(a)'s other subsections reveal a unified theory of "abusive" conduct that might be imported into section 526(a)(4). For example, it is difficult to understand how the prohibition contained in section 526(a)(1) regarding the failure to deliver promised services has anything to offer in terms of revealing what might constitute "abusive" advice regarding the incurrence of debt.

Moreover, the Government mistakenly assumes that the remedial provisions of section 526(c)(2), which provide a cause of action for assisted persons to reclaim from "debt relief agencies" their "actual damages," necessarily means that such damages will inevitably be the product of "abuse" or "bad intent." *See* 11 U.S.C. §526(c)(2). In fact, that remedy is available for even good faith acts of the "debt relief agency." *See id.* §§526(c)(2)(A)-(C). In other words, the actions of the "debt relief agency" need not be strictly "abusive" for the "actual damages" rem-

edy to remain available. Accordingly, this also does not support the Government's profferred narrowing construction.

5. A federal rule of professional conduct applicable to attorneys would be superfluous.

In response to the argument that the application of section 526(a)(4) to attorneys would duplicate existing remedies for "abusive" conduct, the Government maintains that section 526(a)(4) is different because it creates a federal private right of action for an "assisted person" who may be the victim of such abuse, and consequently, "[i]nvalidation of Section 526(a)(4) would render that remedy unavailable with respect to a significant category of improper attorney advice." Gov't Br. 40-41. The Government is mistaken.

A private right of action against attorneys for abusive conduct already exists in the form of a state common law cause of action for legal malpractice. *See, e.g., Gonzalez v. Arana*, No. 94-2059, 1995 WL 32644 at *1 (1st Cir. 1995) (unpublished). Thus, the existing remedy is not purely "discipline by a state bar," as the Government suggests, but also private enforcement.

The policy interests that the Government claims the federal regulation advances are, similarly, already furthered by existing state

schemes. More important, the Government marshals no Congressional findings attesting to the inadequacy of the status quo. For example, the Government states that "the Code creates a uniform nationwide standard, appropriate to bankruptcy practice." Gov't Br. 41. The Government does not explain, however, why the existing standards adopted in the American Bar Association's Model Rules of Professional Conduct, and widely accepted by the states, do not achieve precisely the same "uniform nationwide standard." *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent..."); Minnesota Rules of Prof'l Conduct R. 1.2(d) (same); *see also* Gov't Br. 50 ("Versions of [Rule 1.2(d)] are in effect throughout the Nation, including in petitioners' home State.").

The Government states that "the Code gives a client a private right of action against an unethical attorney who has violated Section 526(a)(4), and it encourages such actions in the public interest by providing for fee-shifting," and says further that "[s]tate bar rules rarely if ever are privately enforceable." Gov't Br. 41. But, as noted, state common law malpractice actions do the same thing.

The Government states further that, while section 526(a) permits a federal court to issue an

injunction to enjoin a bankruptcy lawyer from repeating alleged abuse in another jurisdiction, "an unethical practitioner who has been sanctioned under the law of one jurisdiction may continue to provide unethical advice in another." *Id.* This is not true, however, of existing state regulation in Minnesota or elsewhere. *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 8.5(a) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."); Minnesota Rules of Prof'l Conduct R. 8.5(a) (same).

In short, there is essentially no need for the federal regulation of "abusive" conduct in the manner the Government suggests. On the assumption that Congress does not ordinarily regulate redundantly, this observation further undercuts the Government's assertion that some "narrow" form of regulation is what Congress implicitly had in mind when it enacted section 526(a)(4).

B. In Any Event, a "Narrowing Construction," Even if Possible, Would Merely Substitute a Problem of Substantial Overbreadth for One of Vagueness.

The Government assumes, mistakenly, that it was possible for the Eighth Circuit to have avoided section 526(a)(4)'s unconstitutionality through a narrowing construction. *See* Gov't Br. 43. But even if "the proper interpretation of Section 526(a)(4) is open to question" (and it is not), dodging the substantial overbreadth problem by narrowing the scope of section 526(a)(4) to "abusive" advice simply creates a different kind of constitutional difficulty: vagueness.

The Government's sole response to this problem is to sidestep it almost entirely. It acknowledges petitioners' argument, *see* Gov't Br. 45, but responds only with the following *non sequitur*: "As explained above,...the government's construction of Section 526(a)(4) as limited to a particular set of abusive practices is firmly tethered to the text, history, and purpose of the statute." *Id.* Nothing, however, in the Government's bald recitation of the "text, history, and purpose" of section 526(a)(4) lends any real content to its theory that the section is limited to "abusive" advice. More important, nothing inherent in the label "abusive" illustrates what it actually means.

The Government's proposed "pruning" of section 526(a)(4)–limiting its prohibition to "abusive" advice–is inherently and unavoidably vague. The Government itself cannot pin down its own standard, offering no less than three potential variations: (1) "advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors," Gov't Br. 28; (2) "accumulation of debt with intent to abuse the bankruptcy system or defeat the bankruptcy laws," *id.* at 32; and (3) "advice that debtors incur additional debt to abuse the bankruptcy system or defeat the administration of the bankruptcy laws," *id.* at 38. As amicus NACBA well argues, "[t]he problem is that the Government has plucked the term 'abuse' from thin air. It is not defined by the Act, and it does not (unlike existing ethical rules and statutory provisions) enjoy an operating history and background understanding." NACBA Br. 20.

The relevant vagueness problem is further illustrated by the Government's own statement of the alleged "conduct" element of its version of section 526(a)(4)–which introduces yet another general concept ("encouragement") that appears nowhere in the statutory scheme: "The statute unambiguously requires affirmative encouragement to incur more debt, although that encouragement might be communicated in a variety of ways (both direct and indirect)." Gov't Br. 42

n.14. For a practicing bankruptcy attorney (or anyone of average intelligence), it is virtually impossible to understand what this actually means. It thus "fails to apprise persons of ordinary intelligence of the prohibited conduct." *City of Chicago v. Morales*, 527 U.S. 41, 90 (1999) (Scalia, J., concurring); *see also id.* at 56 ("'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...'") (Stevens, J.).

The inevitable chilling effect that this sort of vague standard creates is clear. As petitioners have argued, section 526(a)(4) is likely, as a practical matter, to prevent attorneys from even discussing with debtors the topic of what debts the debtors may legally incur. The Government counters that rules of professional responsibility guide attorneys in navigating the sometimes fine line between *advocating* illegal conduct and merely *advising* of the legal consequences of potentially illegal conduct. *See* Gov't Br. 42-43. Section 526(a)(4), however, does not adopt or incorporate any of this guidance. As a result, reference to it is of no assistance in saving the statute.

Finally, petitioners argued, *see* Pet. Br. 52 n.9, and the Government did not rebut, that it will often be difficult for an attorney to know

whether an "assisted person" is in fact an "assisted person" at the time he seeks advice from the attorney. Without this knowledge, an attorney cannot know which regime he is operating under–state law ethical rules that compel him to give unfettered advice, or section 526(a)(4) which ties his hands. Not surprisingly, conscientious lawyers have left the field of bankruptcy law altogether. The statute is unconstitutional.

C. Alternately, Section 526(a)(4) Creates an Unconstitutional Content-based Speech Restriction that Cannot Withstand Either Strict Scrutiny or the Court's *Gentile* Standard.

The Government does not challenge petitioners' description of section 526(a)(4) as a content-based restriction on speech. Nor, in relying on *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), does the Government challenge petitioners' argument that, if strict scrutiny applies (as it does), section 526(a)(4) fails its requirements. Instead, apart from invoking *Gentile*, the Government relies almost exclusively on its claim that section 526(a)(4) can be narrowed to avoid unconstitutionality. As demonstrated above, however, the Government's narrowing gloss is unsound. Thus, if *Gentile* does not apply to save the statute, the Government effectively concedes that section 526(a)(4) is unconstitutional.

As explained in petitioners' opening brief, *Gentile* does not apply here. Among other reasons, *Gentile* involved a clash of constitutional values not implicated in this case. Pet. Br. 75. But even if *Gentile* applies, the Government does not demonstrate that its requirements are satisfied. Apart from offering its flawed "narrowing construction" theory, the Government does not even attempt to articulate how section 526(a)(4) imposes "only narrow and necessary limitations on lawyers' speech" to protect an important governmental interest. Section 526(a)(4) thus cannot pass constitutional muster under either strict scrutiny or *Gentile*.

III. The Compelled Speech Requirements of Section 528 Are Unconstitutional.

The law of the First Amendment is not a law of mechanistic categorizations. It is a law of principles. Exalting form over substance, and pandering to labels, the Government contends that this controversy is a "disclosure" case. Gov't Br. 55-56. It then insists that all "disclosure" cases–apparently regardless of whether what is required to be "disclosed" is itself misleading or inaccurate–are reviewed under a deferential form of rational basis analysis. *Id.* If this is a "disclosure" case, however, it is so only in a most strained and attenuated way. Forcing lawyers to label themselves "debt relief agencies" discloses nothing meaningful to the public, and is no more

than an opaque, unwanted, pejorative, and inherently misleading form of self-branding.[5]

Likewise, compelling lawyers to add the phrase "we help people file for bankruptcy relief" in all the myriad circumstances enumerated in section 528, and regardless of the purpose or content of the relevant advertising message, is at best excessive, and most often useless or misleading. Even the Government concedes that this disclosure will sometimes be "extraneous." Gov't Br. 66. The Government's concession, of course, is an exaggerated understatement that serves only to underscore the scope of the problem at hand.

For example, it is difficult to understand why, in the context of advertising services related to "mortgage foreclosures" having nothing to do with bankruptcy proceedings, a lawyer or law firm that also happens to be a "debt relief agency" because it otherwise provides "bankruptcy assistance" to "assisted persons" must nonetheless state in its foreclosure advertisements that it "help[s] people file for bankruptcy relief." 11 U.S.C. §528(b)(2). It is likewise difficult to understand how the lawyer or law firm might tailor the mandated "disclosure" in this

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[5] The Government's observation that the label "debt relief agency" is akin to calling oneself a "modeling agency" does nothing to alleviate this problem. Gov't Br. 65.

illustration to fit the circumstance, yet still render the disclosure "substantially similar" to the statutory formulation, given that the required disclosure and the advertisement have nothing to do with each other.

In truth, this case is properly a "compelled speech" case, and, in any event, under the Court's precedents, should be reviewed under standards of more exacting scrutiny than the watered-down analysis the Government promotes. The required "disclosures" are not "warnings" or "disclaimers." Nor are they "purely factual and uncontroversial"–far from it. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). In reality, they are opaque and frequently counterfactual and, as a result, are far more likely to distract and confuse the public than illuminate anything material about the lawyer's services–thus heightening rather than minimizing First Amendment concerns. *See id.*

Because of the compelled nature of the "disclosures" required under section 528 and their effect, the section is properly reviewed under at least the stricter standards of the Court's *Central Hudson* criteria. *See Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 142 (1994); *In re R.M.J.*, 455 U.S. 191, 203 (1982). Applying the relevant criteria, the Government must demonstrate, among other things, that section 528 is "narrowly drawn" to advance a "substantial in-

terest." The Government, however, does not even attempt to meet this burden, and for obvious reasons.

The Government postulates that the purpose of section 528 is to address a very narrow, specific problem: advertisements that promise to "make...debts 'disappear'" without specifying that the means is through bankruptcy relief. Gov't Br. 60-61. Quite clearly, however, Congress easily could have drafted a "disclosure" statute narrowly tailored to address this specific problem. Instead, it drafted a statute that purports to regulate virtually all advertising by lawyers who provide "bankruptcy assistance" regardless of whether or not the advertisement presents the problem the Government identifies. The breadth of the statute alone, in relation to the problem the Government identifies, belies the Government's claim that section 528 is properly a "disclosure" provision, let alone one narrowly tailored to address the problem the Government cites.

In addition, even if the Court's "reasonably related" analysis in *Zauderer* were to control, this offers the Government no shelter. As the Court has stated in applying the "reasonably related" standard, "[w]e recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected speech." *Zauderer*, 471 U.S. at 651.

This case, of course, involves precisely such an unjustified and unduly burdensome "disclosure" obligation. Lawyers faced with having to make misleading and unwanted disclosures in their advertising are likely simply to forego advertising altogether. In this way, section 528 effectively operates more like a ban than a restriction. *See Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (laws that impose financial burdens on speech are suspect because they raise "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *see also New York Times v. Sullivan*, 376 U.S. 254, 266 (1964). In all events, because section 528 requires "disclosures" that are inherently useless, misleading, inaccurate, and pejorative, it should not be found to pass muster under *any* First Amendment standard.

A. The Correct Standard Is No Less Than the Criteria of *Central Hudson*.

The Government argues that *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) does not supply the correct standard for this compelled commercial disclosure case on the theory that *In re R.M.J.*, 455 U.S. 191 (1982), which applied the *Central Hudson* test, is only applicable to speech *suppression* cases, not those involving *compelled* speech. *R.M.J.*, however, is not so easily cast aside. Mo-

reover, as the Court has indicated, the distinction between compelled speech and suppressed speech is not necessarily significant or dispositive. *See Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 796 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance"); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views"). Indeed, in certain contexts, compelled speech may be even more problematic than compelled silence, and this case presents precisely such a context.

It is true that, in *R.M.J.*, the regulation at issue prohibited attorneys from advertising other than in certain narrowly confined ways. In particular, the rule required the attorney in question to describe his practice as "property law" rather than "real estate law," and also to provide no other description. Thus, in a sense, the regulation in *R.M.J.* was more limiting than section 528, which allows attorneys to put other information in their ads in addition to the required statements. But this is a distinction without a relevant difference. The basic point of *R.M.J.* remains that the attorney faced a choice of advertising in the way the rule mandated or not

advertising at all. The same is true here. More important, this case is actually far more problematic than *R.M.J.* There, the required description "property law" was not inherently misleading or opaque; the attorney simply wished to describe his practice using a different label, and the Court agreed that he could. In contrast, the branding requirements of section 528 are in material respects inherently useless, misleading, inaccurate, and pejorative. If anything, this case presents an even more compelling candidate than *R.M.J.* for application of the *Central Hudson* criteria.

As the Court made clear in *R.M.J.*, "[a]lthough the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." 455 U.S. at 203. As the Court explained further, the restrictions "must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995). Section 528 clearly fails this test.

This case is also analogous to the Court's precedent in *Ibanez*. There the Florida Board of Accountancy reprimanded an attorney for her use of two professional designations–Certified

Public Accountant (CPA) and Certified Financial Planner (CFP)–in her advertising in connection with her law practice, specifically in her yellow pages listing, and on her letter head and business cards. *Ibanez*, 512 U.S. at 138. Recognizing that the attorney's CPA and CFP designations were truthful and not misleading, this Court, applying *Central Hudson*, ruled that the Board could not restrict their use in her advertising. *Id.* at 149.

Once again, the Court reasoned that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* at 142. Once again, section 528 fails this standard. Critically, the main focus of the Court's analysis in *Ibanez* was not that the regulation at issue involved the "suppression of speech" rather than "compelled speech." Rather, it was that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.* at 143 (quoting *Zauderer*, 471 U.S. at 646). Section 528, of course, fails to do this, and the Government cannot cure its deficiencies with semantics.

B. The Government Has Failed to Meet Its Burden.

As the Court has explained, "[i]t is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983)). The record in this case reveals that petitioner law firm and petitioner attorneys engage in a broad variety of advertising in newspapers, telephone directories, television, radio, and the internet. JA 38a-39a. Just as they cannot be subject to a complete ban on advertising, *Bates*, 433 U.S. at 383, they should also not be subject to a restriction that requires compelled "disclosures" in their advertising that are not "narrowly drawn" to serve a "substantial" governmental interest.

The Government complains that petitioner law firm and petitioner attorneys did not include copies of their advertisments in the record. Gov't Br. 69-70. The Government's opportunity to lodge this evidentiary objection, however, expired long ago and was not presented, preserved, or argued on appeal. More important, the Government's complaint inverts its burden: it is for the Government to prove that section 528 properly applies to the advertising activities of petitioner law firm and petitioner attorneys, not the

other way around. Given that the Government has never even alleged that petitioners' advertisements are anything other than truthful and non-misleading, it is too late for it to complain that this has not been proven. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (observing that "[t]here is no claim in this case that there is anything unlawful or misleading about the contents of respondents' publications" and, therefore, "[i]t was proper...to judge the validity of the city's prohibition under the standards set forth in *Central Hudson*").

As noted, an important effect of section 528 is to present a simple but chilling choice: either advertise with the disclosures that section 528 directs, or refrain from advertising at all. Here the Government makes no allegation that petitioner law firm or petitioner attorneys engage in the kind of advertising that the Government contends Congress was concerned about in enacting section 528. The question is whether they may nonetheless be subject to the statute's restrictions. The answer is that they may not.

For decades, the Court has held that commercial speech is protected in some measure under the First Amendment. *Va. State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (statutory ban on advertising prescription drug prices violated the First Amendment). This protection of commer-

cial speech is "justified principally by the value *to consumers* of the information such speech provides." *Zauderer*, 471 U.S. at 651 (emphasis supplied); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 770. For this reason, petitioners have alleged not only that section 528 is unconstitutional as applied to certain attorneys, but that it also violates the public's right to receive information from attorneys. Sec. Am. Compl. ¶¶ 1, 10, 21, 37, *Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 05-CV-2626 (D. Minn. Dec. 15, 2006) [Dkt. No. 34].

The Court recognized this point in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561-62 (1980). Commercial speech is protected because it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* Indeed, "[t]he First Amendment's concern for commercial speech is based on the *informational* function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that *do not accurately inform the public about lawful activity*. The Government may ban forms of communication *more likely to deceive the public than to inform it...*" *Id.* at 563 (citations omitted) (emphasis supplied). In this case, as applied to petitioners, it is section 528's compelled commercial disclosures that (1) are more likely to deceive

than to inform, and (2) are not narrowly tailored. As such, they are invalid.

C. Section 528 Is Unconstitutional Under *Zauderer*.

Even if the Court were to apply the "reasonably related" standard of *Zauderer* rather than the criteria of *Central Hudson*, section 528 is still unconstitutional. Importantly, as a predicate to its articulation of the "reasonably related" standard, the Court in *Zauderer* explicitly "recognize[d] that *unjustified or unduly burdensome* disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651 (emphasis supplied); *see also Ibanez*, 512 U.S. at 146-47 (applying the "unjustified or unduly burdensome" standard). Implicitly, unjustified or unduly burdensome disclosure requirements do not meet the "reasonably related" standard based on their unjustified or unduly burdensome nature. In this case, the challenged requirements of section 528 are unjustified or unduly burdensome because they are vastly disproportionate to the harm they seek to mitigate, and impose requirements that are opaque, unwanted, pejorative, and inherently misleading.

In *Zauderer*, the Court justified the "reasonably related" standard by stating that disclosure requirements "only require [appellant] to

provide somewhat *more* information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650-51 (emphasis supplied). In contrast, the compelled disclosures in this case are quite different. *Zauderer* characterized the compelled disclosure at issue as "a requirement that appellant include in his advertising *purely factual and uncontroversial information* about the terms under which his services will be available." *Id.* at 651 (emphasis supplied). Not so here. In *Zauderer*, the Court justified the standard principally "by the value to consumers of the information such speech provides," and reasoned that therefore "appellant's constitutionally protected interest in *not* providing any particular *factual* information in his advertising is minimal." *Id.* at 651 (emphasis supplied). Section 528, however, compels disclosure of opaque, misleading, unwanted, and pejorative information. As a result, its value to consumers is nil, and certainly petitioners' interest in not providing false and misleading information in their advertising is high. Inasmuch as the concern giving rise to the *Zauderer* standard is "preventing deception of consumers," section 528, which compels misinformation, is plainly "unjustified or unduly burdensome," and as such, violates the First Amendment. *Id.*

Although the Government argues that section 528's "substantially similar" clause provides enough flexibility for attorneys to clarify the na-

ture of their practice such that the speech would no longer be false and misleading, this approach creates its own vagueness problem. What constitutes "substantially" similar? In addition, in order to be accurate in many instances, the statement would have to be substantially *dis*similar to the statutory directive. *See* Pet. App. A-12; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 767 n.5 (D. Minn. 2005). The Government's "substantially similar" argument cannot save the statute.

In this case, the harm caused by section 528's compelled commercial disclosure requirement is obvious–compelled disclosure of largely useless and often misleading information. This result is unjustified and unduly burdensome, and therefore section 528 does not pass the "reasonably-related" test. Indeed, the requirements of section 528 are so unsound that they must necessarily offend the First Amendment under *any* of the Court's standards.

CONCLUSION

For the foregoing reasons, as well at those stated in petitioners' opening brief, the Court should reverse the decision of the court below concluding that attorneys are debt relief agencies. Alternatively, the Court should affirm the decision below that section 526 is unconstitutional, and reverse the determination below that section 528 is constitutional.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, CONNECTICUT BAR ASSOCIATION, BRENNAN CENTER FOR JUSTICE, AND AARP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* supporting Petitioners Milavetz, Gallop & Milavetz, P.A., et al., is filed by two bar associations (the Connecticut Bar Association ("CBA") and the National Association of Consumer Bankruptcy Attorneys ("NACBA") (collectively, the "Bar Associations")), the Brennan Center for Justice at New York University School of Law ("Brennan Center"), and AARP.[1]

The Bar Associations have an important interest in this case because their members are governed by the statutory provisions at issue here, which are part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), codified in the Bankruptcy Code at 11 U.S.C. §§ 526, 527, and 528 ("the Debt Relief Agency Provisions"). These provisions impose various restrictions on the speech and activities of a newly minted category of entities defined by the statute as "debt relief agencies," which the Government and Court of Appeals have interpreted as encompassing attorneys. So construed, the Debt Relief Agency Provisions violate the First Amendment to the Constitution.

The Bar Associations can offer an important perspective on the questions presented by this case. Their members include experienced attorneys familiar with the day-to-day realities of the bankruptcy system and the real-world impact of BAPCPA. Many Americans face bankruptcy as a

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and granted written consent, which is on file with the Clerk. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

result of the recent economic downturn. They face personal and family tragedies – loss of a job, loss of a home, or serious illnesses. They are in dire need of complete and uncensored advice from bankruptcy attorneys.

This Court has recognized that the attorney-client relationship serves to support the goal of "sound legal advice [and] advocacy." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Legal advice can successfully guide a client through the complexities of the bankruptcy system and, indeed, can make the difference between a satisfactory outcome and financial disaster. The Debt Relief Agency Provisions, if applied to attorneys, would profoundly disrupt the attorney-client relationship, at a time when it is most needed by ordinary consumers.

Accordingly, the Bar Associations have filed their own constitutional challenge to the Debt Relief Agency Provisions in the U.S. District Court for the District of Connecticut. On September 9, 2008, the District Court issued an order granting in part and denying in part the Bar Associations' motion for a preliminary injunction. *Connecticut Bar Assn. v. United States*, 394 B.R. 274 (D. Conn. 2008). The District Court's decision is currently on appeal to the U.S. Court of Appeals for the Second Circuit, Nos. 08-4797-CV, 08-5901-CV, 09-001-CV (oral argument scheduled Sept. 24, 2009).

The Brennan Center also has an important interest in this case. The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Its interest in this case arises out of its Justice project, a national, multifaceted effort dedicated to helping ensure that low-income people have access to

effective, enduring, and unrestricted legal assistance in civil and criminal cases. The Brennan Center appeared before this Court on behalf of legal aid lawyers and clients in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), in which the Court struck down a restriction that prohibited attorneys from providing particular "advice or legal assistance" to a client challenging the denial of welfare benefits. *Id.* at 544.

AARP has a significant interest in this case because bankruptcy is a particular concern for older people. AARP has nearly 40 million members over age 50. Bankruptcy filings among people age 55 and older have risen sharply in recent years, with the greatest increases among those 75 and older (up 566.7% between 1991 and 2007) and those ages 65 to 74 (up 177.8%).[2] Overall, filings have risen 150.8 percent among those between the ages of 55 and 64. A majority (62.1%) of all bankruptcies in 2007 had a medical cause.[3]

With limited job opportunities, stagnant incomes, and high medical costs, older people may have more difficulty paying debts or recovering financially if they are forced to file for bankruptcy. Planning for their later years is made all the more difficult if they do not have complete and uncensored advice from attorneys relating to their financial planning, health, and long term care needs, including

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[2] Deborah Thorne, Elizabeth Warren, & Teresa A. Sullivan, Generations of Struggle 1 (2008), *available at* http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf.

[3] David U. Himmelstein, MD, Deborah Thorne, PhD, Elizabeth Warren, JD, Steffie Woolhandler, MD, MPH, et al., Medical Bankruptcy in the United States, 2007, 122 Am. J. Med., 741, 743 (2009), *available at* http://pnhp.org/new_bankruptcy_study/Bankruptcy 2009.pdf.

possibly filing for bankruptcy. Accordingly, AARP has a substantial interest in ensuring that older people facing increased medical costs and limited income in their later years will have access to complete and uncensored legal advice without unwarranted governmental interference with the attorney-client relationship in the bankruptcy context.

SUMMARY OF ARGUMENT

The judgment below should be affirmed to the extent it held Section 526(a)(4) unconstitutional, and it should be reversed to the extent it held Sections 528(a)(4) and (b)(2) constitutional.

I. The unrebutted record evidence shows that the Debt Relief Agency Provisions cannot withstand any level of First Amendment scrutiny. The Government suggests that the Eighth Circuit's judgment holding Section 526(a)(4) unconstitutional rests on nothing more than "two instances" of "hypothesized" violations of the freedom of speech. Govt. Pet. Cert. in No. 08-1225, at 21. Nothing could be further from the truth. The uncontroverted record assembled by the Bar Associations shows how the Debt Relief Agency Provisions operate in the real world and proves that they increase confusion, sow distrust between attorneys and clients, and exacerbate the plight of consumers considering bankruptcy.

Thus, it is the Government's arguments, not the challenges to BAPCPA, that rest on speculation. The Government seeks to defend BAPCPA not as it operates in the real world, but as it was assertedly meant to operate in some imaginary universe hypothesized by the Government. This Court should assess the impact of BAPCPA as it was drafted and

enacted by Congress, and as it actually operates in practice, rather than according to the *post hoc* re-interpretations of the Government's litigators.

II. Section 526(a)(4) would be unconstitutional if applied to attorneys. It is a content-based restriction on speech and cannot satisfy any level of First Amendment review, let alone strict scrutiny. The Government proffers a saving construction (with several alternative phrasings), attempting to limit Section 526(a)(4) to certain ill-defined "abusive practices." Govt. Pet. Cert. in No. 08-1225, at 12 (citation omitted). The Government's construction, however, is not textually supportable and also conflicts with *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933), where this Court addressed the "in contemplation of" bankruptcy test, without suggesting that it was limited to abusive transactions. Further, the Government's reading would render Section 526(a)(4) superfluous, because the examples of "abuse" cited by the Government are already prohibited. The Government's proposed construction also introduces the new constitutional vice of vagueness because it relies on an amorphous standard of "abuse."

III. As construed by the Government, Sections 528(a)(4) and (b)(2)(B) also fail any version of First Amendment scrutiny. They are not ordinary disclosure requirements of the kind upheld in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Rather, they are the sort of controversial – indeed, misleading – disclosure rules that *Zauderer* very clearly did *not* approve. Moreover, Section 528 would extend to attorneys representing nondebtors, where the mandated disclosure would be affirmatively false.

IV. This Court should construe the Debt Relief Agency Provisions as not applying to attorneys. Such a saving construction would be a simpler and more straightforward solution than the re-interpretations of the provisions urged by the Government.

ARGUMENT

I. THE UNCONTROVERTED RECORD DEMONSTRATES THE CONSTITUTIONAL FLAWS IN THE DEBT RELIEF AGENCY PROVISIONS.

This Court has recognized the importance of a full factual context in assessing the constitutionality of a regulation of speech. *See, e.g., Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 668 (1994) (stressing the importance of a record and remanding First Amendment challenge to "permit the parties to develop a more thorough factual record"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495-96 (1986) (rejecting Government's argument that "a review of historical facts" was unnecessary in challenge to restriction on cable speech).

"[I]n cases raising First Amendment issues [this Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). "Deference to a legislative finding" "cannot limit judicial inquiry when First Amendment rights are at stake," because "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so

whether the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978). *See also Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (opinion of Breyer, J.) ("We consequently must examine the record independently and carefully . . . . ").

Thus, in striking down a regulation of speech in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), this Court explained that "[b]oth the District Court and the Court of Appeals found that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars." *Id.* at 489. This Court noted the district court's comment that "'none of the witnesses, none of the depositions that I have read, no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote ... strength wars.'" *Id.* (citations omitted). Similarly, in *Edenfield v. Fane*, 507 U.S. 761 (1993), in the course of striking down a Florida ban on CPA solicitation, this Court observed that the State had "present[ed] no studies that suggest personal solicitation ... creates the dangers ... the Board claims to fear." *Id.* at 771.

The Bar Associations have developed a factual record uncontroverted by the Government regarding the challenged provisions of BAPCPA in their lawsuit in the U.S. District Court for the District of Connecticut. That record demonstrates that the Debt Relief Agency Provisions cannot survive any level of First Amendment scrutiny because they do not advance any legitimate governmental interest at all. Rather than ensuring that debtors receive accurate information about their rights and obligations in the federal bankruptcy system, the challenged provisions

of BAPCPA *increase* public confusion, *mislead* and *harm* consumers, and impose a substantial undue burden on attorney-client communications. Under any standard of constitutional scrutiny, a law regulating protected expression cannot stand where the sole evidence regarding its practical operation shows that it has a wholly counterproductive impact.

The unrebutted factual record includes a series of sworn statements from bankruptcy attorneys and a bankruptcy client documenting the real-world operation of the debt relief provisions. For example, the record reveals that:

- "Most of the information [mandated by BAPCPA] is irrelevant most of the time, much of it is incorrect, and it is confusing to [consumers]."

- An attorney testified that the provisions left his clients "glassy-eyed." "Uniformly, potential clients that come to see me are confused by the required disclosures of BAPCPA." The statute "has not only created confusion for potential clients but in some cases has caused irreparable harm to their ability to obtain a fresh start from the bankruptcy process. In these cases, potential clients have chosen to proceed without an attorney, but have failed to fully comply with the Code and as a result, they have had their cases dismissed."

- Another witness testified that BAPCPA requires attorneys "to give inaccurate and misleading disclosures, causing confusion among clients which takes considerable time to clear up and generally disrupts and interferes with [attorneys'] relations with their clients."

- A client testified that the disclosures "confused us and left us indecisive as to which direction to turn."

With respect to Section 526(a)(4) in particular, the evidence showed that there are many "legal and even necessary reasons why a consumer might incur debt 'in contemplation of bankruptcy.'" For example, it typically makes sense for debtors with old or undependable cars to incur secured debt to purchase more reliable vehicles so they have a consistent means of getting to work and earning an income with which to pay their creditors. Similarly, if a client has an unpaid domestic support obligation, an attorney might advise the client to pay that obligation prior to filing a bankruptcy petition, by incurring additional debt through a home equity line of credit, refinancing a home mortgage loan, or a loan from a 401(k) retirement fund or a family member who is aware that the client intends to file for bankruptcy and that the debt may be discharged. An attorney might advise a client lawfully to incur debt to pay taxes in order to avoid interest, penalties, and civil or criminal liability; to pay wage claims of employees in order to avoid criminal prosecution; to pay insurance premiums in order to avoid the devastating effects on debtors and their families from illness, accidents, natural disasters and so on (indeed, property insurance is often required during the pendency of the bankruptcy proceeding, *see* 11 U.S.C. § 1326(a)(4)); to pay for urgent medical care for the debtor or a family member; to pay for home repairs that are needed for health, welfare and safety of family members; to pay for utility service to avoid a cut off of power; or to pay for tuition for school.

Yet the plain language of Section 526(a)(4) forbids attorneys from advising a debtor to incur more debt in contemplation of bankruptcy. The record evidence shows that the real-world impact of Section 526(a)(4) has been to prevent attorneys from offering such advice, even when the reasons to incur debt are lawful, and even when the debt would be beneficial for both debtors and creditors alike. For example, one bankruptcy attorney testified that, although he had advised debtors legitimately to incur more debt prior to filing for bankruptcy "on numerous occasions over the past 25 years," the enactment of BAPCPA had changed his practice. "Since the enactment of BAPCPA, I have had clients that would have benefited from such advice, but I will not provide it in the future as I feel it could violate the provisions of Section 526." "I am chilled in my ability ethically to counsel my clients, to give them the advice that I see fit and proper, and to zealously represent them . . . ."

The attorney explained:

> For example, since the enactment of BAPCPA, I have had many clients ask about accessing 401(k) accounts or home equity loans in order to save to buy a car, pay taxes or satisfy a domestic support claim. . . . They ask me: How should I pay? "Can I borrow from a 401(k)?" "Can I use a line of credit on my house?" Though these actions are lawful, and indeed, these are debts that would not necessarily be affected by bankruptcy, I cannot advise them to take these steps. They need my help,

> my legal advice, but I am no longer able to advise them what to do.

Another attorney described the plight of a married couple considering filing for bankruptcy who needed to replace an unreliable car:

> My understanding is that advice to get a car loan, which in practical terms would be unaffected by the bankruptcy, or to borrow money from friends or relatives, even though the clients intend to pay them back, would be prohibited under the debt relief provisions. Because of the uncertainty as to whether I am a debt relief agency, I did not offer the same advice to these clients, as I would have prior to BAPCPA.

Section 526(a)(4) also has devastating consequences for clients with health problems:

> Another married couple that I recently met is contemplating filing for bankruptcy and trying to figure out how to deal with medical debt not covered by their insurance. The wife's doctor had recently found a lump in her breast and preliminary tests showed that it is probably cancerous and that surgery and extensive medical treatment was required. Because of the cost, the wife was considering foregoing treatment altogether. . . . Because I may be a debt relief agency, I did not feel that I could fully discuss these options with my clients. . . . Here, I had a client who could die if she did not get prompt medical treatment and I couldn't say

> anything to her about it or discuss her financial options.

The testimony showed that Section 526(a)(4) is counterproductive in practice because it prevents advice that could avert bankruptcy in the first place. An attorney explained that refinancing a home – although it incurs additional debt and thus falls within the plain language of Section 526(a)(4)'s prohibition – can often avoid the need for a bankruptcy filing:

> Just prior to BAPCPA, I conducted two closings with clients for the sole purpose of paying off unsecured debt and medical expenses. In both cases, the loans provided enough funds to satisfy the creditors and avoid filing for bankruptcy. . . . Because I believe that these clients would be "assisted persons" or "prospective assisted persons" under Section 526 and because I may be considered a debt relief agency, I would not offer the same advice to similarly situated clients today.

The second clause of Section 526(a)(4) has a further harmful impact on the attorney-client relationship. The second clause restricts advice to a client "to pay an attorney . . . fee or charge for services performed as part of preparing for or representing a debtor in a case under this title." The evidence in the record assembled by the Bar Associations reveals that the second clause, if applied to attorneys, would severely interfere with advice regarding payment of the fee. As one attorney described:

> When the issue of attorney's fees comes up I am prohibited from advising the person to pay my fee and from discussing with my clients common ways that people in financial distress pay for legal representation in a bankruptcy, such as through chapter 13 plan payments, borrowing from [a] family member who is aware the debtor will file a bankruptcy, drawing on a home equity line or obtaining a loan from the debtor's 401(k) plan. This creates an uncomfortable and troublesome situation in which I cannot even discuss my retainer or fees in candor with my clients. As a result, many clients remain perplexed about how I can represent them in a bankruptcy proceeding if I can't even answer a fundamental question.

Another attorney testified: "I have had clients that have forgone medicine, medical treatment, and food in order to scrape up the funds to file for bankruptcy. I had a client who[m] I discovered was eating cat food to save money to pay costs and fees." "Because of the restrictions i[n] Section 526(a)(4), I simply don't know what to tell people who are struggling to meet even their basic necessities."

Section 526(a)(4)'s restriction on advice regarding payment of attorney's fees thwarts the interests of both debtors and creditors by leading clients to make financially costly mistakes:

> Operating without this information, some clients may make uninformed, bad choices. For example, in one case, after I

> told a client he could use any lawful means to obtain funds to pay my fee[,] his response was that he would get a cash advance on his credit card. Then I had to explain that this option would not be appropriate, could result in nondischargeable debt and other possible penalties. However, even in light of his statement, I still could not discuss with him the legitimate ways he could obtain funds to pay me.

In the constitutional challenge brought by the Bar Associations in the District of Connecticut, the Government did not even respond to, much less contradict, any of the factual record demonstrating that the challenged provisions of BAPCPA are counterproductive in practical operation. This established record provides ample basis for invalidating the Debt Relief Provisions under any level of First Amendment scrutiny.

II. SECTION 526(a)(4) IS UNCONSTITUTIONAL IF APPLIED TO ATTORNEYS.

Section 526(a)(4) provides that a debt relief agency shall not "advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title." Section 526(a)(4) would be unconstitutional if applied to attorneys.

A. Section 526(a)(4) Triggers Strict Scrutiny.

This Court has opined that "advice or legal assistance" is entitled to full First Amendment protection and that "information respecting . . . statutory rights" is "vital." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544, 546 (2001). Accordingly, courts must "accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went For It*, 515 U.S. 618, 634 (1995).

In *Velazquez*, this Court held that a restriction "foreclos[ing]" attorney provision of "advice or legal assistance" to clients amounted to an unconstitutional viewpoint-based restriction on speech. *See* 531 U.S. at 542, 544. The same reasoning applies here.

Section 526(a)(4) is by its terms a content-based restriction on speech that prevents attorneys from communicating certain information based on its message. The statute "single[s] out a particular idea for suppression because it [is] . . . disfavored." *Velazquez*, 531 U.S. at 541. As the Court explained in *NAACP v. Button*, 371 U.S. 415 (1963), a law prohibiting an individual from "advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance" violates the First Amendment. *Id.* at 434; *see also U.M.W. v. Illinois Bar*, 389 U.S. 217, 223 (1967) (holding *Button* broadly applicable).

"Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 129 S.Ct. 1093, 1098 (2009) (2009) (citation omitted). Such

content-based regulations must be narrowly tailored to a compelling state interest. *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759, 2772 (2008). Section 526(a)(4) could not possibly meet that standard.

B. Section 526(a)(4) Is Unconstitutional Under Any Level of First Amendment Scrutiny.

The Government urged below that Section 526(a)(4) should be reviewed under *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), in which five Justices upheld the application of the "substantial likelihood of material prejudice" standard to speech in a press conference by an attorney in connection with a pending case. *Id.* at 1075 (opinion of Rehnquist, C.J.). *Gentile*, however, explained that it involved rules "aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire." *Id.* The Debt Relief Agency Provisions do not fall into either category. *Gentile* cannot be understood as extending to all forms of attorney speech, in all contexts, for such an expansive reading would be foreclosed by *Velazquez*.

Moreover, *Gentile* warned that its standard would permit "only narrow and necessary limitations on lawyers' speech." *Id.* In fact, the Court upheld the restrictions in *Gentile* only after observing that they were "narrowly tailored" to a "fundamental" interest. *Id.* at 1075, 1076. Any reliance on *Gentile* by the Government to water down the applicable standard of review would therefore be unavailing.

In any event, it is plain that Section 526(a)(4) cannot survive any level of First Amendment scrutiny

– including *Gentile*. Even intermediate scrutiny cannot be satisfied by "various tidbits," such as "anecdotal evidence" and "educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). Here, the uncontroverted record shows not only that there is no predicate for Section 526(a)(4), but also that its restriction of speech is wholly counterproductive.

C. The Government's Saving Construction of Section 526(a)(4) Is Flawed.

1. The Government's Construction of Section 526(a)(4) Is Not Textually Supportable.

The Government offers a saving construction that consists of several alternative phrasings. The Government contends that the phrase "to incur more debt in contemplation of" bankruptcy in Section 526(a)(4) should be construed to refer to (i) "advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors," Govt. Pet. Cert. in No. 08-1225, at 15, or (ii) advice regarding "debt incurred with the expectation of using the bankruptcy discharge to avoid full repayment," *id.* at 16, or (iii) advice to "knowingly load up on debt before filing for bankruptcy," *id.* at 9 (internal quotation marks omitted), or (iv) advice "to accumulate eve-of-filing debt that would abuse the bankruptcy system." *Id.* at 10. None of these various formulations has merit.

First, the text of the statute says nothing about abuse of the bankruptcy system. Instead, the statute refers simply to incurring debt "in contemplation of" bankruptcy. This Court has interpreted such language broadly: "the controlling question is with respect to the state of mind of the debtor and whether

the thought of bankruptcy was the impelling cause of the transaction." *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933). The Court in *Conrad, Rubin & Lesser* did not suggest that the "in contemplation of" bankruptcy test is limited to fraudulent transactions. To the contrary: the Court held that attorney's fees paid for a completely legitimate purpose – to enable a lawyer to negotiate with creditors for a time extension for the repayment of debt and, if necessary, for operation of the debtor's business under the creditors' supervision – nonetheless fell within the "in contemplation of" bankruptcy test. *Id.* at 478. The Court explained that "negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. A man is usually very much in contemplation of a result which he employs counsel to avoid." *Id.* at 479 (citation and internal quotation marks omitted). Accordingly, this Court has indicated that any debt incurred with a view to bankruptcy, or incurred because a bankruptcy filing is planned, falls within the category of debts incurred "in contemplation of" bankruptcy.

Yet advising a client to incur additional debt in such circumstances can hardly be automatically equated with "abuse." In fact, the record assembled by the Bar Associations shows that, in many instances, it is entirely proper for a debtor to incur additional debt on the eve of bankruptcy – indeed, to incur debt *precisely because* he or she intends to file for bankruptcy. *See* Part I, *supra*.

The next problem with the Government's attempt to rewrite Section 526(a)(4) is that it would render that provision entirely superfluous. Debt incurred for fraudulent purposes is already

nondischargeable, and, indeed, incurring it may give rise to criminal liability. 11 U.S.C. § 523(a)(2); 18 U.S.C. §§ 152-157. Prior to BAPCPA, it was already settled law that a debtor's good faith could be questioned if there were signs of fraud. *In re Charles*, 334 B.R. 207, 222 (Bankr. S.D. Tex. 2005). Advising a client to engage in any unlawful conduct was also already prohibited, prior to BAPCPA. *See* 18 U.S.C. § 2 (imposing criminal liability for counseling an offense). Every state's rules of professional conduct prohibit an attorney from advising a client to engage in unlawful or fraudulent conduct. *See, e.g.*, ABA Model Rules of Professional Conduct R. 1.2(d). In fact, the Government itself notes that rules of professional conduct for attorneys commonly prohibit advice to engage in fraudulent or improper conduct, Govt. Cert. Pet. in No. 08-1225, at 21, and it cites an example where ethics rules have already been applied to police abuse of the bankruptcy system. *Id.* (citing *Attorney Grievance Comm'n of Maryland v. Culver*, 381 Md. 241, 275-76 (2004)).

Entirely apart from Section 526(a)(4), BAPCPA requires an attorney who represents a consumer debtor in filing a bankruptcy petition to make her own reasonable investigation into the circumstances giving rise to the debtor's petition, including a specific inquiry into the veracity of the debtor's debt and asset schedules. 11 U.S.C. § 707(b)(4)(C)-(D). By signing the petition, the attorney personally certifies that she has determined that the petition is well-grounded in fact, that she has no knowledge that the debtor's schedules are incorrect, and that she has determined that the petition does not constitute an "abuse" under Section 707(b)(1). *See id.*; *see also* Fed. R. Bankr. P. 9011(b) (by signing petition, attorney certifies that "it is not being presented for any

improper purpose" and "factual contentions have evidentiary support"). BAPCPA also expands a bankruptcy court's power to dismiss petitions for "abuse." 11 U.S.C. § 707(b)(1), (3), and (6).

2. The Government's Construction Creates A New Vice of Vagueness.

Thus, the Government's reinterpretation of Section 526(a)(4) would read it as adding nothing to existing prohibitions. The only change is that the Government's construction would introduce the new vice of vagueness into the statute. The various formulations offered by the Government are not the same. It is unclear whether the Government thinks its standard encompasses abusive conduct generally, whether it is limited to "loading up" on debt prior to filing a petition, or whether it is focused on attempts to manipulate the "means test" adopted by Congress to restrict the availability of Chapter 7 discharges. Govt. Cert. Pet. in No. 08-1225, at 25-27.

The problem is that the Government has plucked the term "abuse" from thin air. It is not defined by the Act, and it does not (unlike existing ethical rules and statutory provisions) enjoy an operating history and background understanding. As a result, the Government's statutory revision creates a palpable danger that "abuse" will be defined in different and unpredictable ways. Indeed, the term "abuse" in new section 707(b)(3) has given rise to an enormous amount of litigation, sometimes about the legal meaning of the term and often fact-sensitive, and there is no suggestion that section 526(a)(4) would be limited to only that type of abuse. BAPCPA's legislative history confirms that, "as recognized by Congress, 'abuse' may be found to exist

based on a review of the totality of circumstances surrounding the filing. No formula, however well considered or crafted, can be flexible enough to encompass the endless combinations of circumstances which debtors bring to the bankruptcy court. While intended to provide a very objective standard, such formulas have proven historically to be the source of much litigation focused on interpreting and defining all of the parameters of the standards." Bankruptcy Reform, Joint Hearing Before House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. 94 (1999) (statement of Judith Greenstone Miller, Commercial Law League of America) (citation omitted).

Such uncertainty is intolerable in the context of the regulation of speech. Statutory ambiguities and variations in the definition of "abuse" render the Government's test too manipulable and uncertain to provide constitutionally adequate guidance to attorneys. A statute is impermissibly vague when the conduct it forbids is not ascertainable. *See Chicago v. Morales,* 527 U.S. 41, 56 (1999). "[People] of common intelligence cannot be required to guess at the meaning of the enactment." *Winters v. New York,* 333 U.S. 507, 515 (1948). The void-for-vagueness rule is particularly important in the speech context, because of the possibility of a chilling effect. Under the Government's reinterpretation of Section 526(a)(4), the statute is at least as imprecise as many prohibitions on speech held void for vagueness. For example, in *Plummer v. City of Columbus*, 414 U.S. 2 (1973) (*per curiam*), the Court held that a statute providing that "[n]o person shall *abuse* another by using menacing, insulting, slanderous, or profane language" was facially invalid. *Id.* at 2 (emphasis added). In *Coates v. Cincinnati,* 402 U.S. 611 (1971),

the Court struck down a municipal ordinance prohibiting three or more persons to "conduct themselves in a manner annoying to persons passing by." *Id.* at 614. In *Houston v. Hill,* 482 U.S. 451 (1987), the Court invalidated an ordinance making it "'unlawful for any person to ... in any manner oppose ... or interrupt any policeman in the execution of his duty.'" *Id.* at 455. The Government's proposed rewriting of Section 526(a)(4) to incorporate a new standard of "abuse" suffers from the same impermissible vagueness.

3. The Structure of Section 526 Does Not Support The Government's Argument.

The Government contends that the structure of Section 526 supports its construction. Govt. Cert. Pet. in No. 08-1225, at 17. The Government's argument is incorrect.

First, the Government points to the remedy afforded by Section 526(c), which provides that in the event of a violation of Section 526(a)(4), the debtor may bring suit against the debt relief agency to recover "actual damages," as well as restitution of any fees paid by the debtor. Govt. Cert. Pet. in No. 08-1225, at 18. But Section 526(c) says nothing about "abuse," and in any event the Government's argument confuses the *substantive scope* of Section 526(a)(4) with the question of *remedy*. The two issues are distinct. In addition, the presence of an "actual damages" remedy will often be irrelevant. The attorney will lose her own fees, and will pay the debtor's attorney's fees, regardless of whether there are actual damages.

The Government also cites subsections 526(a)(2), which prohibits debt relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief, and 526(a)(3), which prohibits debt relief agencies from misrepresenting to debtors the costs or benefits of bankruptcy. Govt. Br. 57. But the Government's interpretation would construe Section 526(a)(4) as largely superfluous in light of these prohibitions. In short, the structure of Section 526 refutes rather than sustains the Government's statutory construction.

4. The Government Ignores the Second Half of Section 526.

The Government fails to analyze the second clause of Section 526(a)(4), which prohibits an attorney from advising a client to "pay an attorney . . . fee or charge for services performed as part of preparing for or representing a debtor in a case under this title." Thus, the second half of the section forbids advice on how to pay an attorney, regardless of whether the payment scheme entailed incurring more debt.

The second half of Section 526(a)(4), even as interpreted by the Government, is a separate First Amendment violation. One of the most difficult issues faced by financially distressed debtors is how to pay for legal representation. Chapter 7 debtors can expect to pay $1200 to $2500 for legal representation and Chapter 13 debtors can pay $1500 to $4000 and up depending on the complexity of the case. As discussed in Part I, *supra*, there are many instances in which it is lawful and appropriate to advise a debtor to borrow money to pay a bankruptcy attorney's fee. A debtor may access a fully secured home equity line of credit to pay the fee, essentially

using some of the equity in his or her home to produce cash. It may also be advisable for a debtor to borrow from a 401(k) plan to finance representation.

Indeed, in Chapter 13 cases, which can save a home from foreclosure but which give rise to higher attorney fees because of their complexity, clients ordinarily pay their attorneys by incurring additional debt. Usually, a portion of the attorney's fees are paid up front with the remainder being paid through the plan. That portion of the fee that is paid through the plan constitutes a debt to the attorney which is approved by the court and paid out as part of the plan.

Section 526, if applicable to lawyers, would forbid them from advising their clients to use this standard arrangement which ordinarily harms no one, is subject to court approval, and is usually the only realistic way a debtor can afford legal representation and access to chapter 13. Advice to incur additional debt before bankruptcy is appropriate in almost every chapter 13 case, and chapter 13 cases have constituted 30% to 40% of all bankruptcies since the 2005 Act. To prohibit an attorney from advising a client regarding the payment of fees is a direct attack on the provision of advice to clients and, indeed, on the legal profession.

III. SECTION 528 IS UNCONSTITUTIONAL IF APPLIED TO ATTORNEYS.

This case also presents the constitutionality of Sections 528(a)(4) and (b)(2)(B), which compel the inclusion of the following statement in advertising: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement." 11 U.S.C.

§ 528(a)(4), (b)(2)(B). If attorneys were included within the definition of "debt relief agency," then these provisions would be unconstitutional, under any version of First Amendment scrutiny.

A. Section 528 Fails First Amendment Scrutiny.

The Government contends that review of Section 528 involves "a straightforward application" of this Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Govt. Opp. Cert. in No. 08-1119, at 15. The Government's contention is wrong. *Zauderer* governs routine disclosure requirements involving uncontroversial information. Section 528 is not a law mandating factually accurate disclosures.

Rather, as construed by the Government, Section 528 forces attorneys to describe themselves as "debt relief agencies" – a newly created category that will puzzle and confound lay clients. Whether or not attorneys fall within the legal definition of "debt relief agency" created by the statute, the relevant question – in the context of speech to "members of the public" who are "often unaware of the technical meanings" of legal terms – is how the words would be understood in "ordinary usage." *Zauderer*, 471 U.S. at 652. Whatever one thinks a "debt relief agency" might be, an attorney in private practice certainly does not qualify as one in the ordinary understanding of a consumer. Many consumers may think that a "debt relief agency" is a governmental agency. Others may infer that the attorney is no different from a bankruptcy petition preparer or anyone else who provides bankruptcy assistance without a law license. Consumers will be mystified by the reference to lawyers as "debt relief agencies." As one attorney

testified in the Bar Associations' litigation, "[t]he required language forces me to make statements that impede my ability to distinguish myself from nonattorneys or government agencies. In fact, some potential clients have expressed concern to me that the designation denotes that I am an agent for the federal government and that information which would otherwise be confidential might somehow be communicated to the government."

Zauderer offers no support to such a misguided disclosure requirement. In *Zauderer*, this Court *overturned* a state court reprimand of an attorney for an advertisement that was neither false nor deceptive and sustained the reprimand *only* to the extent the advertisement omitted a disclosure that a client would be liable for costs in the event a contingent-fee lawsuit was unsuccessful. The Court noted the important constitutional protections accorded to attorney print advertising, 471 U.S. at 642, and indicated that restrictions on it could not be predicated on "unsupported assertions." *Id.* at 648. The Court held that disclosure requirements are permissible only to the extent they "are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. The Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment." *Id.* The Court upheld the state's requirement that an attorney disclose a contingent-fee client's potential liability for costs only because it found that the possibility of deception was "self-evident" and that "substantial numbers of potential clients would be so misled" without the state's disclosure rule. *Id.* at 652.

If anything, *Zauderer* demonstrates the constitutional defect in Section 528. Subsequent cases have reaffirmed that the "reasonably related" test of *Zauderer* has real teeth. This Court has cited *Zauderer* for the proposition that the Government is not free "to enact measures short of a total ban to prevent deception or confusion" simply by asserting that its regulations are necessary to address "potentially misleading" advertising. *Ibanez v. Fla. Dept. of Pro. & Bus. Regulation*, 512 U.S. 136, 146 (1994) (striking down, under *Zauderer,* a compelled disclaimer requirement).

Although this Court has examined the constitutionality of factual disclosure requirements as applied to professionals, it has never upheld such provisions in the absence of any evidence that the regulations were reasonably necessary to address a potential problem – a standard that Section 528 cannot meet. In *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), for example, the Court *invalidated* a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions that were collected during the preceding year that were actually given to the charities for whom the fundraisers worked. The Court explained that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id.* at 796-97 (emphasis in original). The Court rejected any distinction between "compelled statements of opinion" and "compelled statements of 'fact'": "either form of

compulsion burdens protected speech." *Id.* at 797-98. *See also Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 100-01 (1990) (plurality opinion) (reversing attorney punishment for "specialist" claim on letterhead because there was "no contention that any potential client or person was actually misled or deceived," nor "any factual finding of actual deception or misunderstanding").

In short, even assuming that *Zauderer* prescribes the proper First Amendment test, the undisputed factual record demonstrates that Section 528 flunks that test. "If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated." *Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari) (criticizing Eleventh Circuit decision upholding a compelled disclaimer requirement for dentist advertising).

B. Section 528, If Applied To Attorneys, Would Extend To Lawyers For Clients Other Than Debtors.

A further constitutional flaw in Sections 528(a)(4) and (b)(2)(B) is that, if applied to attorneys, they could not be limited to lawyers representing debtors. Rather, they would encompass a host of attorneys representing creditors, landlords, and other clients whose legal issues relate to bankruptcy.

The statute applies to "debt relief agencies." A "debt relief agency" includes, with certain exceptions, "any person who provides any bankruptcy assistance to an assisted person" in exchange for a fee. 11 U.S.C. § 101(12A). "Bankruptcy assistance," is turn,

includes "providing information, advice, counsel, document preparation, or filing, or attendance at a creditor's meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." § 101(4A).

Conspicuously absent from the definition of "bankruptcy assistance" is any reference to a debtor, let alone a specific type of representation. Thus, the express language of Sections 101(4A) and 101(12A) would apply to any attorney engaged by a debtor, creditor or any other non-debtor party. Nothing in the definition of "assisted persons" limits that term to persons who file bankruptcy cases: "The term 'assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250." § 101(3). The term's scope is sufficiently broad to encompass not only persons who are currently debtors, but also any person who may potentially become a debtor, creditors of a debtor, and persons who are potential creditors of potential debtors. The definitions of "assisted person" and "debt relief agency" incorporate no less than six terms defined by section 101 or section 110 ("person," "debt," "consumer debt," "bankruptcy petition preparer," "creditor," "affiliate"). If Congress had wanted to limit their reach to debtors, surely it would somewhere have included the term "debtor," which is also defined in section 101.

Hence, nothing in the text of the statute limits its application to those representing debtors contemplating filing for bankruptcy. The statute could apply to attorneys representing a wide range of nondebtor parties, including customers or employees

of a failed business, non-debtor spouses in divorce or family law proceedings, or anyone else who may need representation related to a bankruptcy proceeding. If applied to attorneys, Section 528 would extend to real estate and commercial lawyers. Counsel for a creditors' committee, whose constituents would include individual and class action plaintiffs, might be a "debt relief agency." The definition of "bankruptcy assistance" is broad enough to apply to advice given by counsel for the plaintiffs and for the creditors' committee. Similarly, counsel for a retirees' committee under section 1114 of the Bankruptcy Code represents clients with claims for retirement and healthcare benefits. *See* 11 U.S.C. § 1114. Many, if not most of the retirees, would fit within the definition of an "assisted person" rendering the retirees' committee's counsel a "debt relief agency."

Section 528(b)(2) requires that the mandatory disclosure appear in advertisements pertaining to "assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." Yet where an attorney represents creditors or landlords rather than debtors, the statement that "We help people file for bankruptcy relief" would be affirmatively false. The Government-mandated disclosure would itself constitute deceptive advertising. Neither the Court of Appeals nor the Government has offered any justification for such a pernicious and ill-conceived disclosure rule.

C. The Government's Justifications for Section 528 Lack Merit.

The Government maintains that Section 528 is supported by "governmental interests in ensuring that those who enter bankruptcy know what it

entails." Govt. Opp. Cert. in No. 08-1119, at 15 (internal quotation marks and citation omitted). But BAPCPA already requires – in a provision that is not at issue here -- that all advertising subject to the statute must state that it relates to "bankruptcy relief under [the Bankruptcy Code]." 11 U.S.C. § 528(a)(3). Advertisements that promote "assistance with respect to" certain consumer debt or credit problems must disclose that the assistance "may involve" filing for bankruptcy relief. 11 U.S.C. § 528(b)(2)(A). Any interest in ensuring that consumers understand that they would be filing for bankruptcy is thus already met.

Similarly, Section 521(a)(1)(B)(iii)(I) (which is not challenged here) requires written notice to debtors regarding chapters 7, 11, 12, and 13 "and the general purpose, benefits, and costs of proceeding under each of those chapters," as well as "the types of services available from credit counseling agencies," as mandated by Section 342(b). This requirement fully addresses the Government's asserted interest in ensuring that consumers have knowledge or appreciation that they are in fact filing for bankruptcy. The Government has put forth no reason that a two-sentence statement describing an attorney as a "debt relief agency" would serve any additional purpose at all. Indeed, it would only contribute to consumer confusion.

The Court of Appeals suggested that nothing in the Bankruptcy Code precludes petitioners and other members of the Bar from identifying themselves as both attorneys and debt relief agencies in their advertisements. But that suggestion ignores the constitutional principles already discussed in Part III-A, *supra*: it is the Government's obligation to

demonstrate that the regulation of speech is properly tailored to an appropriate interest – it is not the speaker's duty to fix the constitutional defects in the statute.

Nor does the Government explain how an attorney could cure the mystifying label of "debt relief agency" by identifying herself as both an "attorney" and an "agency." The mystification would remain. Further, clarification would be difficult and incomplete given the limited space of an advertisement, where there is little extra room and where long explications in fine print are typically ignored. The issue of limited space is real. One attorney in the Bar Associations' litigation testified: "I was forced to make room in my Yellow Pages listing for the required language by eliminating other important information for potential clients."

The Government also cites legislative history, Govt. Opp. Cert. in No. 08-1119, at 3, but those materials do not support the constitutionality of Section 528. One hearing involved testimony by a creditor who was the owner of a home furnishing store. The retailer's testimony was hearsay purportedly based upon his having "talk[ed] to my customers about why they have filed for bankruptcy," and in any event he *made no mention of attorney advertising at all*. Bankruptcy Reform Act of 1999 (Part II), Hearing on H.R. 833 Before House Judiciary Comm., 106th Cong. 123 (1999). The other piece of legislative history cited by the Government raised a concern that lawyers were not advising their clients properly about the negative consequences of filing for bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, Hearing on H.R. 975 before House Judiciary Comm., 108th Cong.,

1st Sess. 55 (2003) (statement asserting that there are attorney ads that "do not even mention bankruptcy—they talk about 'restructuring' your finances. I question whether these aggressive advertisers inform their clients about the serious downsides of filing for bankruptcy"). This concern is fully addressed by other provisions of the Code that are not challenged here, such as Sections 521(a)(1)(B)(iii)(I), 528(a)(3) and (b)(2)(A). The Government does not and cannot explain why a confusing statement that attorneys are "debt relief agencies" adds to any further consumer understanding on the matter.

IV. THIS COURT SHOULD AVOID SERIOUS CONSTITUTIONAL QUESTIONS BY INTERPRETING THE STATUTE TO EXCLUDE ATTORNEYS FROM THE CATEGORY OF "DEBT RELIEF AGENCIES."

The Government urges the Court to interpret BAPCPA to avoid, rather than invite, constitutional difficulties. On this basis, the Government seeks to rewrite Sections 526(a)(4) and 528 beyond what the statutory text would allow. But there is a far easier cure for the constitutional infirmities in BAPCPA: construing the definition of "debt relief agencies" to exclude attorneys.

The statutory definition of "debt relief agency" enacted in BAPCPA fails to mention the word "attorney" or "lawyer." 11 U.S.C. § 101(12A). By contrast, the definition of "debt relief agency" explicitly includes the defined term "bankruptcy petition preparer." and the definition includes numerous other defined terms. "Attorney" is separately defined in § 101(4), which makes no reference to debt relief agencies or to subsection

(12A). Plainly, had Congress meant to include "attorneys" within the category of "debt relief agencies," it would have been very easy to do so. After all, Congress provided definitions for more than 63 terms, including "accountant," "affiliate," "entity," "security," and "stockbroker." *See* §§ 101(1), (2), (15), (49), (53A).

Although the statute refers to "legal representation" in the definition of "bankruptcy assistance" (11 U.S.C. § 101(4A)), the most plausible conclusion is that the reference was designed not to sweep all attorneys within the scope of the statute, but rather to fortify the consumer protection provisions of BAPCPA by authorizing bankruptcy courts to regulate non-attorney bankruptcy professionals who engage in the unauthorized practice of law. Thus, subsections (b) and (e) of section 110 were amended to strengthen the protections against unauthorized legal representation in a number of ways, including new required disclosures by bankruptcy petition preparers.

This inference is strengthened by the disclosure provisions of BAPCPA. Section 527(b) requires debt relief agencies to inform assisted persons that they have the right to hire an attorney. If attorneys were considered to be "debt relief agencies," this disclosure provision would be nonsensical: it would require an *attorney* to inform a client that he or she had the right to hire an *attorney*.

If the plain language left any ambiguity, the question would be resolved by a rule of construction contained in the Act itself. Section 526(d)(2) provides specifically that the provisions at issue shall not "be deemed to limit or curtail the authority or ability of a State or subdivision or instrumentality thereof to

determine and enforce qualifications for the practice of law under the laws of that State; or of a Federal court to determine and enforce the qualifications for the practice of law before that court." 11 U.S.C. § 526(d)(2). If the Debt Relief Agency provisions were construed as applying to lawyers, they would limit the power of state and federal courts to regulate the legal profession – Section 526, for example, by determining what advice may ethically be given by lawyers, and Section 528, by prescribing what their advertisements may ethically say.

Values of federalism complement the rule of construction. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975). This Court has recognized that federal statutes ordinarily will not be interpreted as displacing state authority over professions such as law or medicine, absent a clear and plain statement of congressional intent. *See Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). There is no such plain statement here.

The most logical conclusion is that "debt relief agencies" should be defined as including bankruptcy petition preparers and excluding attorneys. Such an interpretation would avoid the serious constitutional questions presented by the Debt Relief Agency Provisions.

CONCLUSION

The judgment below should be affirmed to the extent it held Section 526(a)(4) unconstitutional, and it should be reversed to the extent it held Sections 528(a)(4) and (b)(2) constitutional. Alternatively, the Court should hold that attorneys do not qualify as "debt relief agencies" within the meaning of BAPCPA.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Nos. 08-1119, 08-1225

In The Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

UNITED STATES,

Petitioner,

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PUBLIC GOOD, THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST, THE ENVIRONMENTAL LAW FOUNDATION, AND THE CENTER FOR ENVIRONMENTAL HEALTH AS AMICI CURIAE IN SUPPORT OF RESPONDENT UNITED STATES

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INTEREST OF *AMICI*

Public Good, the Center for Science in the Public Interest, the Environmental Law Foundation, and the Center for Environmental Health submit this brief as *amici curiae* in support of the United States.[1] The brief is limited to the question of what standard should govern First Amendment review of mandated factual commercial disclosures like those at issue in this case.

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through amicus participation in cases of particular significance for consumer protection, freedom of speech, and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. As an organization with a particular interest in both safeguarding consumers and maintaining free speech, Public Good submits this brief to explain why well-established precedent – as well as the reliance of vast sectors of the United States economy on a constitutional regime permitting robust commercial disclosure requirements – counsel in favor of maintaining the current deferential standard of review.

The Center for Science in the Public Interest (CSPI) is a non-profit organization founded in 1971, with approximately 756,000 members in the United

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than *amici*, their members, and their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

States. CSPI has been a strong advocate for nutrition and health, food safety, alcohol policy, and sound science. Its award-winning newsletter, *Nutrition Action Healthletter*, with some 900,000 subscribers in the United States and Canada, is the largest-circulation health newsletter in North America. CSPI has carved out a niche as the organized voice of the American public on nutrition, food safety, health, and other issues. It has long sought to educate the public and to advocate government policies that are consistent with scientific evidence on health and environmental issues. It supports menu labeling information, ingredient and nutritional information on packaged foods, and other forms of mandatory disclosure of facts known only to the seller. These disclosures ensure that consumers are both informed about the content of the foods they buy and not deceived by half-truths in food advertising and labeling. Any further constriction of the role of government in requiring mandatory disclosures would result in less informed consumers, leading to marketplace inefficiency.

Environmental Law Foundation is a recognized nonprofit charitable corporation that provides legal advice and assistance to protect the environment, communities, and consumers against harmful toxics. ELF seeks to improve environmental quality for those most at risk by providing access to information, strategies and enforcement of environmental, toxics, and community right-to-know laws. In the course of that work ELF has for nearly twenty years enforced California laws requiring consumer, product and

safety disclosures to ensure a fully informed and fair marketplace. ELF recently ended years of litigation against school bus operators who operate buses with high levels of diesel engine exhaust in the school bus cabin where the children are. California law mandates that such exposures be accompanied by warnings to children and parents of the presence of that highly toxic substance. When it became clear warnings were going to be required by the court, the school bus operators chose instead to retrofit and replace the offending buses, resulting in cleaner air for not only the children, but the neighborhoods and schools affected by the buses. *See 2009 Clay Awards*, California Lawyer (March 2009), *available at* http://www.callawyer.com/story.cfm?eid =899950&evid= 1&newIssueDate=03-01-2009. This outcome illustrates that disclosure laws can both inform and act as a prod to improve substantive safety and consumer protection.

The Center for Environmental Health is a nonprofit public interest organization, with over 7,000 supporters. Based in Oakland, California, CEH advocates for public health, to prevent pollution, and to protect children, families, and communities from toxic chemicals. CEH challenges government regulations that are not properly protective of the public right to know and public health; litigates to protect consumers exposed to hazardous chemicals in products; and supports communities in their struggles for cleaner environments. CEH provides information to its supporters and the general public regarding legislative, regulatory, and policy issues that affect health and the environment, including commenting

on federal and state pesticide policies; effective corporate campaigns to protect public health; and ways families can protect themselves from the toxic chemicals in air, water, food, and consumer products. CEH coordinates CHANGE (Californians for a Healthy and Green Economy), a statewide chemicals policy reform coalition. CEH also serves as a lead partner in worldwide coalitions such as Health Care Without Harm.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty-five years ago, in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court set out the standard for constitutional review of mandatory commercial disclosures of factual information. That standard affords considerable deference to government efforts to compel disclosures in the commercial context. The Court recognized not only that such disclosures may prevent consumer deception, but also that they contribute to, rather than detracting from, the stream of beneficial commercial information. By fostering more speech rather than less, the *Zauderer* disclosure standard represents the very opposite of the type of "highly paternalistic" speech prohibition, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), that this Court has disfavored since it first extended First Amendment protection to commercial speech. A disclosure regime allows consumers to take more responsibility for their financial future, not less. It provides them with information that they would not otherwise have. As long as there is a reasonable

relationship, therefore, between a particular set of disclosures and the interest that the government seeks to serve, and as long as those disclosures are not unduly burdensome or otherwise unjustified, *Zauderer*, 471 U.S. at 650-51, the disclosures comport with the requirements of the First Amendment.

Petitioners' attempts to replace the *Zauderer* standard with some form of heightened scrutiny make little sense in the context of this case or in the wider marketplace. Neither intermediate nor strict scrutiny has any place in the review of factual commercial disclosure requirements. Adopting either of these standards would severely threaten not only the disclosure regime at issue in this case but also the entire edifice of federal, state and local disclosure laws – ranging from warnings about the presence of mercury in light bulbs to calorie disclosures in fast food restaurants to securities registration requirements.

Because these laws serve so many useful, even essential, functions, both for consumers and for the economy as a whole, only the most compelling concerns could justify adopting a new standard that would threaten their continued application. Nothing in the facts of this case, or in the arguments raised by petitioners, presents any such reason. Indeed, to adopt a heightened standard would be to elevate the interest of the speaker in suppressing facts over that of the audience in being informed. That is an inversion of what the First Amendment requires.

The Court should affirm that the *Zauderer* standard remains applicable both in this case and in any review of compelled disclosure of factual commercial information.

ARGUMENT

I. A DEFERENTIAL STANDARD OF REVIEW APPLIES TO THE DISCLOSURE REGIME IMPOSED BY SECTION 528.

The proper standard for judicial review of mandatory factual disclosures in commercial contexts has been settled for a quarter of a century. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court established a deferential rule of review that has guided courts, legislatures, regulatory agencies, and businesses ever since. A governmental requirement that factual commercial information be disclosed is valid "as long as [the] disclosure requirements are reasonably related to the state's interest" and are not "unjustified or unduly burdensome." *Id.* at 651.

Mandatory disclosures in commercial contexts are reviewed according to the *Zauderer* "reasonable relationship" standard. *See, e.g., New York State Rest. Ass'n v. New York City Bd. of Health* [hereinafter *NYSRA*], 556 F.3d 114, 132 (2d Cir. 2009) (under *Zauderer*, "rules mandating that commercial actors disclose commercial information" are subject to "more lenient review"); *United States v. Bell*, 414 F.3d 474, 485 (3d Cir. 2005) (per *Zauderer*, in commercial setting, the government "may impose reasonable regulations on content to prevent deception of customers"); *United States v.*

Schiff, 379 F.3d 621, 631 (9th Cir. 2004) (applying *Zauderer* standard) ("mandated disclosure of factual, commercial information does not offend the First Amendment").

The mandatory disclosure provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 11 U.S.C. § 528(a)(4) and (b)(2)(B), should be reviewed – and upheld – under this standard.

A. The *Zauderer* Standard Reflects The Reasons Commercial Speech Is Protected By The First Amendment.

Applying a more lenient standard to commercial speech disclosures than to commercial speech restrictions accords with the reason that advertising receives constitutional protection in the first place: to "insure that the flow of truthful and legitimate commercial information is unimpaired." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). This principle formed the foundation upon which the commercial speech doctrine was developed. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected ... because it furthers the societal interest in the free flow of commercial information"). And the centrality of the informational role of commercial speech has

remained a constant in the ensuing decades. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357 366 (2002) (First Amendment protection applies to commercial speech because "the free flow of commercial information is indispensable" to the public interest) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 765); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) ("societal interests in broad access to complete and accurate commercial information [are what] First Amendment coverage of commercial speech is designed to safeguard"); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (First Amendment protects "the free flow of commercial information").

A deferential standard for government disclosure regimes springs directly from this principle. When government "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion). "[T]he preferred remedy [for potentially misleading speech] is more disclosure rather than less." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990) (plurality opinion). Accordingly, it is "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24. "Within commercial speech . . . the primary constitutional value concerns the circulation of

accurate and useful information. For the state to mandate disclosures designed more fully and completely to convey information is thus to advance, rather than to contradict, pertinent constitutional values." Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 28 (2000).

The *Zauderer* standard represents the application of these basic principles underlying this Court's commercial speech jurisprudence. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S. at 650 (emphasis added).

Lower courts have readily applied this reasoning, emphasizing the distinct consequences of commercial disclosure requirements and restrictions on commercial speech:

> [M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and

> free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.

National Elec. Mfrs. Ass'n v. Sorrell [hereinafter *NEMA*], 272 F.3d 104, 113-14 (2d Cir. 2001) (*accord NYSRA*, 556 F.3d at 132; *see also Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992) ("To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information").

State courts, too, have adopted and relied on the reasoning of *Zauderer*. *See, e.g., Walker v. Board of Prof'l Responsibility*, 38 S.W.3d 540, 546 (Tenn. 2001) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal") (quoting *Zauderer*); *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 752 (Mo. 1986) ("The interests of the State, by requiring 'factual and uncontroversial information' about the services involved, are advanced at no significant cost to the

disclaimant's first amendment rights. More important is the value to consumers of the greater information conveyed").

B. The *Central Hudson* Test Does Not Apply To Mandatory Factual Disclosures.

Petitioners argue, unavailingly, that the disclosures mandated by section 528 of Title 11 should be assessed according to this Court's standard for reviewing *restrictions* on commercial speech, set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Precisely this argument – in the specific context of attorney advertising – already was made and explicitly rejected by this Court in *Zauderer*.

The attorney petitioner in *Zauderer* argued "that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contend[ed] that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so." 471 U.S. at 650.

The Court in *Zauderer* explicitly rejected this argument. The attorney petitioner, the Court observed, "overlook[ed] material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Disclosure regimes are subject to less stringent review "because the First Amendment interests implicated by disclosure

requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 652 n.14.

> [I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'

Id. at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982); *citing Central Hudson Gas & Electric*, 447 U.S. at 565; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. at 772, n. 24).

For this reason the Court explicitly held that the *Central Hudson* standard should not apply in the case of commercial disclosures of factual information. Instead, a "reasonable relationship" test should apply in cases where the government has not prohibited or restricted the flow of commercial information but rather has simply required advertisers "to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650.

Lower courts have been no less explicit. *See NEMA*, 272 F.3d at 115 ("*Zauderer*, not *Central Hudson*, describes the relationship between means and ends demanded by the First Amendment in

compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that restrict commercial speech"; *id.* at 113 (to apply *Central Hudson* to a disclosure requirement is to "misperceiv[e] the proper standard."). *See also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (applying *Zauderer* standard to compelled commercial disclosures); *Bell*, 414 F.3d at 485 (same); *Schiff*, 379 F.3d at 631 (same).[2]

Petitioners seek to circumvent the conclusion that *Central Hudson* is inapplicable to compelled disclosures by proposing a novel two-tier standard, according to which the *Zauderer* standard applies only where the compelled disclosures are necessary to prevent deception or substantial likelihood of consumers being misled, and *Central Hudson* applies otherwise. Pet. Br. at 78-79. But Petitioners' alleged precedents for applying *Central Hudson* in cases not threatening deception concern either restrictions on commercial speech, *In re R.M.J.*, 455 U.S. 191,[3] or fully protected, non-commercial speech, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), and hence

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[2] The Eleventh Circuit, while applying the full *Central Hudson* test to mandatory disclosure regimes contrary to the explicit holding of *Zauderer*, has nevertheless upheld the challenged regimes by emphasizing the greater leniency accorded disclosures as opposed to restrictions on speech. *See Borgner v. Brooks*, 284 F.3d 1204, 1213-14 (11th Cir. 2002); *Abramson*, 949 F.2d at 1577.

[3] In fact, in striking down the restrictions at issue, the Court in *In re R.M.J.* suggested that instead "a warning or disclaimer might be appropriately required." 455 U.S. at 201.

are inapplicable. Petitioners' argument finds no support in the language or reasoning of *Zauderer*.

Indeed, *Zauderer* explicitly rejected the argument that the State needed to "establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception [and] that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so." 471 U.S. at 650. The Court's recognition that commercial disclosure requirements serve First Amendment interests in the free flow of information is not confined to cases of potential deception.

Lower courts have likewise rejected the strained interpretation of *Zauderer* proposed by Petitioners. "*Zauderer's* holding was broad enough to encompass ... disclosure requirements" not concerned with preventing consumers from being misled. *NYSRA*, 556 F.3d at 133. *See also NEMA*, 272 F.3d at 115 (noting that *Zauderer* applied even though the "compelled disclosure at issue . . . was not intended to prevent 'consumer confusion or deception' per se, but rather to better inform consumers"). Indeed, the First Circuit in 2005 "found *no* cases limiting *Zauderer*" to "potentially deceptive advertising." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 310 n.8 (emphasis added).

The principle that, in the context of commercial speech, mandatory factual disclosures are scrutinized more leniently than are restrictions

on speech is widely recognized. *See Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002 (following *Zauderer*) ("Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech"); *NYSRA*, 556 F.3d at 132 (applying *Zauderer*) ("rules mandating that commercial actors disclose commercial information" are subject to "more lenient review than regulations that restrict accurate commercial speech"); *Walker*, 38 S.W.3d at 546 (citing *Zauderer*) ("The fact that the regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment").

C. Strict Scrutiny Does Not Apply to Mandatory Factual Disclosures.

If the heightened scrutiny of *Central Hudson* has no place in the analysis of section 528, then strict scrutiny is even less appropriate. Yet in support of heightened scrutiny for the disclosure requirements of section 528, petitioners attempt to analogize this case to a variety of cases in which this Court applied the most stringent level of scrutiny. Pet. Br. at 76-84. These arguments were all made, and rejected, in *Zauderer*.

Like Philip Q. Zauderer in 1985, petitioners liken their situation to that of speakers refusing to violate their own consciences by mouthing a political

message prescribed by the government. Pet. Br. at 76-77. And like Mr. Zauderer's, petitioners' sallies are readily met. "[T]he interests at stake in [commercial disclosures] are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*." *Zauderer*, 471 U.S. at 651. In contrast to the rights of freedom of conscience violated by compelled statements of personal belief, "[t]he right of a commercial speaker not to divulge accurate information about his services is not . . . a fundamental right." *Id.*; *see also NEMA*, 272 F.3d at 114 ("[T]he individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state, are not ordinarily implicated by compelled commercial disclosure") (citations omitted). To the contrary, "required disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." *NEMA*, 272 F.3d at 114.

Petitioners' reliance on *Riley*, 487 U.S. 781, is of no greater avail. Strict scrutiny was applied in *Riley* only because the compelled disclosures were analyzed as noncommercial speech. *See id.* at 796 (finding that the charitable solicitors there engaged in "fully protected expression" rather than "[p]urely commercial speech"). In fact the Court in *Riley* explicitly noted that commercial speech is "more susceptible to compelled disclosure requirements." *Id.* at 796 n.9 (citing *Zauderer*); *see also Bell*, 414

F.3d at 479-80 (noting distinction in *Riley*). Petitioners have not argued that the advertising disclosures at issue in the present case are anything other than commercial speech.[4]

In urging heightened scrutiny for mundane mandatory commercial disclosures, Petitioners here advance a radical new notion: that the interest of a commercial speaker in suppressing facts outweighs the interest of an audience in receiving accurate commercial information. That is a notion that does not comport with the First Amendment.

D. The Disclosures At Issue Here Are Governed By *Zauderer*.

The advertising disclosures mandated by section 528 fall comfortably within the category of disclosures covered by the *Zauderer* standard. This Court has repeatedly endorsed the use of similar disclosures in the context of professional advertising. *See Zauderer*, 471 U.S. at 650-51 (upholding requirement that attorney state in advertisements that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful); *In re R.M.J.*, 455 U.S. at 201 ("a warning or disclaimer might be appropriately required . . . in order to dissipate the possibility of consumer confusion or

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[4] The Fifth Circuit in *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008) appears to have applied the strict scrutiny of *Riley* to the disclosure requirements of BAPCPA, even while finding that the requirements withstood that scrutiny. For the reasons stated explicitly in *Riley*, however, there is no reason to apply strict scrutiny to the commercial disclosures at issue here.

deception. '[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture[;] the preferred remedy is more disclosure, rather than less'") (quoting *Bates*, 433 U.S. at 375 (1977)) (footnotes omitted).

In this case the required disclosures are straightforward: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." As in this Court's earlier cases, the disclosures required by sections 528(a)(4) and (b)(2) are targeted at "dissipat[ing] the possibility of consumer confusion or deception." *In re R.M.J.*, 455 U.S. at 201. Whether they succeed in this endeavor is a matter of deference to Congress, subject only to *Zauderer*'s requirement that the requirements be "reasonably related to the State's interest in preventing deception of consumers"[5] and not "unjustified or unduly burdensome."

To say that compelled factual disclosures are analyzed according to the *Zauderer* standard is not to say that they are immune from meaningful First Amendment review. *See Walker*, 38 S.W.3d at 546 ("Of course, the state must always meet its burden of justifying the need for regulation in the first place"; disclosure requirements will not be upheld if "unduly burdensome"). In *Ibanez v. Florida Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994), for example, this Court found unconstitutional a Florida provision that, among other things, prohibited accountants

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[5] As noted, the applicability of the *Zauderer* standard is not confined to only those disclosure regimes whose purpose is to prevent deception. *See, e.g., NEMA*, 272 F.3d at 115.

from advertising themselves as certified specialists without certain detailed disclaimers. *Id.* at 146-49. Quoting *Zauderer*, the Court noted that "in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing 'unduly burdensome disclosure requirements [that] offend the First Amendment.'" *Id.* at 146. In the particular circumstances of that case, however, the Court found that the level of detail required in the disclaimer was unduly burdensome, because it "effectively rule[d] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id.* at 146-47. In addition, the Court found the regulation "unjustified," given regulators' "failure ... to point to any harm that is potentially real, not purely hypothetical." *Id.* at 146. *See Douglas v. State*, 921 S.W.2d 180, 188 (Tenn. 1996) ("[W]e read *Ibanez* to mean that the disclaimer violated the First Amendment simply because it was 'unduly burdensome' under the *Zauderer* analysis").

It is true that in general, there are relatively few cases in which "unjustified or unduly burdensome disclosure requirements" offend the First Amendment by "chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. Certainly, the great majority of disclosure regimes that have been reviewed under the *Zauderer* standard have passed constitutional muster. *See, e.g.*, *NYSRA*, 556 F.3d 114; *NEMA*, 272 F.3d 104; *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294; *Connecticut Bar Ass'n v. United States*, 394 B.R. 274 (D. Conn. 2008). The reason for the relative paucity of successful

challenges may lie in the fact that a regime favoring disclosures rather than limitations on speech comports fully with the principles underlying the First Amendment.

In the present case, the disclosures mandated by section 528 especially with the limiting construction proposed by the government, do not exhibit the shortcomings found objectionable in *Ibanez*. In contrast to the agency record found "bare" of justification in *Ibanez*, 512 U.S. at 148, the legislative record here includes ample evidence of attorneys engaging in precisely the sort of advertising that the disclosures were designed to remedy. *See* U.S. Br. at 21. Nor are the disclaimer requirements "unduly burdensome," given their simplicity and the flexibility offered by permitting debt relief agencies to make a "substantially similar statement" to the one mandated. 11 U.S.C. § 528(a)(4) and (b)(2)(B). Lawyers as to whom the disclosures as written would not be wholly accurate are free to craft a "similar" statement or to supplement the required statement – to employ, that is, "more disclosure rather than less." *Peel*, 496 U.S. at 110. It is difficult to see how the First Amendment is violated by this regime.

In any event, regardless of whether this Court finds that the disclosure requirements pass muster, it is clear that *Zauderer* provides the standard under which they are to be reviewed.

II. INCREASING THE LEVEL OF SCRUTINY FOR DISCLOSURES OF FACTUAL COMMERCIAL INFORMATION WOULD DISRUPT A BROAD AND EXTENSIVE REGULATORY FRAMEWORK.

It is not only precedent in the juridical sense that dictates the application of the *Zauderer* standard here. Upon the foundation of *Zauderer* and the principles it embodies, the federal government and the states have erected "a vast regulatory apparatus" designed to prevent deceptive commercial speech and to compel additional useful disclosures. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 153. To alter that foundation "would work a sea change in this area of regulation," *id.* at 155, disrupting the well-established and pervasive disclosure regimes that govern American markets and protect the nation's consumers.

The Second Circuit has noted "the potentially wide-ranging implications" of a First Amendment complaint similar to that in this case:

> Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. See, e.g., ... 15 U.S.C. § 781 (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of

> pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.

NEMA, 272 F.3d at 116.

Statutes, regulations and ordinances compelling commercial disclosures are ubiquitous. "There are literally thousands of similar regulations on the books – such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the

taxpayer...." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 316 (Boudin, C.J., concurring).

These regulations serve a wide variety of purposes in addition to the prevention and remedying of deceptive advertising. Even a brief sampling of those purposes, and the laws that implement them, illustrates why "[t]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Id.*

A. Mandatory Disclosure Laws Are Essential For Consumer Protection.

Government disclosure regimes intended to protect consumers are pervasive at both the federal and state levels. The Federal Trade Commission imposes mandatory disclosure rules in such areas as "the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel." Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 664 (1977).

Indeed, statutory consumer protection regimes relying on mandatory disclosures encompass a wide variety of subject matter areas. A sampling of these laws reveals their variety and the degree to which consumers rely on mandated disclosures every day.

1. Health and safety.

Numerous health and safety-related disclosure laws are in place at the federal, state and local levels.

These include required warnings on potentially dangerous products. *See, e.g.*, 27 U.S.C. § 215 (requiring warning label on alcohol bottles); Cal. Health & Safety Code § 110423 (prohibiting the sale or distribution of certain products containing ephedrine group alkaloids unless the product label clearly and conspicuously contains certain statements and warnings); New York Envtl. Conserv. Law § 33-0707 (authorizing regulators to require disclosure of pesticide formulas); *United States v. Sullivan*, 332 U.S. 689, 693 (1948) (upholding federal law requiring warning labels on "harmful foods, drugs and cosmetics"); *NEMA*, 272 F.3d at 113-16 (rejecting First Amendment challenge to Vermont statute requiring that mercury-containing light bulbs be packaged with labels advising consumers that the bulbs contained mercury and should be disposed of as hazardous waste); 21 C.F.R. § 1.21 (1996) (authorizing Food and Drug Administration to require disclosure of material facts to avoid misleading labeling of food, drugs, or devices).

They also include menu labeling laws, *e.g.*, New York City Health Code § 81.50, laws requiring identification of and notification of proper disposal of hazardous waste, *e.g.*, Cal. Health & Safety Code § 25250.25, and laws mandating warnings of potential

exposure to certain hazardous substances). *E.g.*, Cal. Health & Safety Code § 25249.6.

Health maintenance organizations and other health plan providers must disclose the terms of the services they offer. *See, e.g.*, 29 U.S.C. §§ 1021-1022 (federal summary plan description requirement); N.Y. Pub. Health Law § 4408 (state HMO coverage disclosures); N.Y. Pub. Health Law § 2803-c(3) (enumerating "rights and responsibilities" to which patients are entitled); N.M. Stat. § 59A-57-4 (same). *See also* N.Y. Pub. Health Law § 206(1)(r) (mandating that all hospitalized patients receive a booklet upon admission explaining their rights). Nursing homes must meet similar requirements regarding residents' rights. 42 U.S.C. §§ 1395i-3(c)(1)(B), 1396r(d)(6).

Providers of long-term care insurance are in many states required to provide certain disclosures as a condition of marketing their products. *See, e.g.*, Okla. Stat. tit. 36 § 2043; Minn. Stat. § 62A.50; Idaho Code Ann. § 41-4605. They may even be required to disclose the tax consequences of purchasing such insurance. *See, e.g.*, Haw. Rev. Stat. § 431:10H-216.

2. Consumer finance.

Mandatory factual disclosure regimes pervade the law of consumer finance. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1667f, and Regulation Z, 12 C.F.R., Part 226 (requiring creditors to make written disclosures of all finance charges and related aspects of consumer credit transactions, including disclosing finance charges

expressed as an annual percentage rate); Ky. Rev. Stat. Ann. § 286.9-102 (requiring compliance with federal TILA disclosures); Mich. Comp. Laws § 445.1862 (same); Nev. Rev. Stat. Ann. § 604A.435 (same); Cal. Civ. Code § 1916.5(a)(6) (requiring a statement in "at least 10-point boldface type, consisting of the following language: Notice to borrower: This document contains provisions for a variable interest rate"). Mortgage brokers are required by state law to make specific additional disclosures relating to loan fees and terms. *See, e.g.*, Fla. Stat. § 494.0038; Mass. Gen. Laws ch. 183 § 63; N.D. Admin. Code 13-05-01-04. Debt collectors must disclose to consumers that they are contacting them to collect a debt. *See* 15 U.S.C. § 1692g. Credit repair organizations must provide both federal, *see* 15 U.S.C. § 1681, and state, *see, e.g.*, Minn. Stat. § 332.57, disclosure statements.

3. Other matters of consumer interest.

Disclosure regimes directed to consumer protection extend into virtually every industry. The federal Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (2000), for example, directs the FTC to issue regulations requiring that all consumer commodities other than food, drugs, therapeutic devices, and cosmetics be labeled to disclose net contents, identity of commodity, and name and place of business of the product's manufacturer, packer, or distributor. The Wool Products Labeling Act, 15 U.S.C. §§ 68-68j, requires that wool product labels indicate the country in which the product was processed or manufactured and that mail order promotional materials clearly and conspicuously

state whether a wool product was processed or manufactured in the United States or was imported. The Fur Products Labeling Act, 15 U.S.C. §§ 69-69j, requires that articles of apparel made of fur be labeled and that invoices and advertising for furs and fur products specify, among other things, the true English name of the animal from which the fur was taken and whether the fur is dyed or used. The Textile Products Identification Act, 15 U.S.C. §§ 70-70k, requires that any textile fiber product processed or manufactured in the United States be so identified and that mail order promotional materials clearly and conspicuously indicate whether a textile fiber product was processed or manufactured in the United States or was imported. And a provision of Vermont law requires particular labeling disclosures for all maple syrup sold in the state. Vt. Stat. Ann. tit. 6, § 490.

In addition, various federal agencies are authorized to treat material omissions from advertisements as actionably misleading. *See* 15 U.S.C. § 55 (authorizing FTC to determine falsity based on "the extent to which the advertisement fails to reveal facts material in light of representations" made).; 21 U.S.C. § 321(n) (authorizing Food and Drug Administration "to determine misbranding based on the extent to which the labeling fails to reveal facts material in the light of . . . representations"); 15 U.S.C § 771 (providing for liability when a securities prospectus knowingly or negligently "omits to state a material fact necessary in order to make the statements [made], in the light of the circumstances under which they were made, not misleading").

B. Mandatory Disclosure Laws Promote Transparent And Efficient Markets.

Disclosure regimes that rely on the deference of the *Zauderer* standard pervade not just consumer transactions but the entirety of the American economy. Disclosures are no less crucial to investors than to consumers. *See, e.g.*, David S. Rudner, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 Pace L. Rev. 39, 64 (2005) (discussing benefits to market efficiency of SEC's required disclosure rules). Indeed, the whole of the securities industry is premised on "transparency" – that is, required disclosure of factual information. *See, e.g.*, Promulgation of Trade Regulation Rule, 43 Fed. Reg. 59,614, 59,638 (Dec. 21, 1978) (codified at 16 C.F.R. pt. 436) ("By establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings"); Daniel D. Rubino, *et al.*, *Corporate and Securities Law Update*, 67 PLI/NY 11, 51 (1999) ("One of the principal goals underlying SEC regulation ... is the fostering of market transparency"); O. Dennis Hernandez, Jr., *Broker-Dealer Regulation Under the New Penny Stock Disclosure Rules: An Appraisal*, 1993 Colum. Bus. L. Rev. 27, 29 (appraising adequacy of federal regulation "in providing meaningful disclosure and market transparency" in over-the-counter stock market"). *See also Rubin v Coors*, 514 U.S. 476, 492 n.1 (1995) (Stevens, J., concurring in judgment) (noting 15 U.S.C. § 77e (requiring registration statement before selling securities) as example of

beneficial disclosure requirement). Disclosure requirements are an essential component of state blue sky laws as well. *See, e.g.*, Del. Code Ann. tit. 6 § 7314; Mass. Gen. Laws ch. 110A, § 202; N.H. Rev. Stat. Ann. § 421-B:17-a; N.Y. Gen. Bus. 359-e.

Courts have recognized that the entire edifice of securities regulation rests on a deferential regime favoring mandatory disclosures. *See, e.g.*, *Commodities Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 108 (2d Cir. 2000) (upholding disclosure rules of the Commodity Exchange Act because "[t]he disclosure requirement at issue here was reasonably related to the government's interest in preventing ... hypothetical statistical presentations that, as Congress observed, could lead to inefficiencies in the commodities markets that are contrary to the public interest").

The disclosure regimes just surveyed could likely withstand – as various others have withstood – an inquiry into whether they were "unjustified" or "unduly burdensome" under *Zauderer*. *See, e.g.*, *NYSRA*, 556 F.3d 114 (upholding NYC menu labeling ordinance); *Pharm. Care Mgmt. Ass'n*, 429 F.3d 294 (upholding mandated disclosures by pharmacy benefit managers to health benefit providers). There is considerably greater doubt that they could survive heightened scrutiny, or even the threat of an increase in costly litigation posed by raising the level of scrutiny. But there is no doubt at all that our nation is well served by the continued protection which these laws afford to both its economy and its consumers. The First Amendment

interest in the free flow of information is served as well.

CONCLUSION

Even a brief sampling of the myriad disclosure regimes upon which much of the nation's economic activity relies illustrates the critical importance of maintaining a deferential level of First Amendment review for laws requiring factual commercial disclosures. The *Zauderer* standard has for a quarter century allowed disclosure regimes to protect the public by enhancing the flow of commercial information. Neither doctrinal developments in the past twenty-five years nor the particular facts of this case offer any sound reason to abandon that standard. To the contrary, they provide every reason to reaffirm it.

Respectfully submitted,

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